81 -2278

No.

Office - Supreme Court, U.S.
FILED
JUN 11 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNION ELECTRIC COMPANY,
Petitioner,

vs.

CITY OF KIRKWOOD, MISSOURI, a municipal corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROBERT F. SCHLAFLY
CHARLES G. SIEBERT
ANN E. BUCKLEY
SCHLAFLY, GRIESEDIECK, FERRELL & TOFT
314 N. Broadway, Suite 1300
St. Louis, Missouri 63102
(314) 421-0845
Attorneys for Petitioner Union Electric Company

June 10, 1982

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS FOR REVIEW

I. Whether the United States Court of Appeals for the Eighth Circuit erred in deciding that the First Amendment, as interpreted by the *Noerr-Pennington* doctrine, did not protect petitioner, an electric utility, from antitrust liability in damages based solely on its collection of rates pursuant to statutory procedures on requests for rate increases filed with the federal and state regulatory agencies, where it was not alleged that such filings were an abuse of the administrative process or a sham?

II. Whether the United States Court of Appeals for the Eighth Circuit erred in deciding that the state-action and implied-repeal rules do not bar antitrust liability in damages of petitioner, an electric utility, where the violation is based solely on its use of rates filed with the respective federal and state agencies?

III. Whether the United States Court of Appeals for the Eighth Circuit erred in holding that electricity is a "commodity" within the meaning of the *Robinson-Patman Act*?

TABLE OF CONTENTS

	Page
Questions for Review	i
Opinions and Orders Below	1
Statement of Jurisdiction	2
Constitutional Provisions Involved	2
Statutes Involved	2
Statement of the Case	2
The Complaint	3
District Court Decision	4
Court of Appeals Decision	4
Argument	5
I. The decision below is in conflict with the *Noerr-Pennington* decisions of this Court by its holding that the First Amendment protection from antitrust liability is lost if the requests to the government achieve anticompetitive results.	5
II. In holding that the antitrust laws apply where the only violation alleged is the effect of the electric rates filed with the federal and state regulatory commissions, the decision below conflicts with the principles of implied repeal, set out in *Gordon* v. *New York Stock Exchange*, and of state-action exemption, set out in *Parker* v. *Brown*.	9

III. The decision that electricity is a "commodity" under the Robinson-Patman Act presents an important question of federal law which should be settled by this Court. ... 14

Conclusion 18

Appendix:

A. Opinion of the Court of Appeals A-1

B. Order of the District Court A-18

C. Memorandum of the District Court A-19

D. Order and Judgment of the Court of Appeals A-25

E. Order of the Court of Appeals Denying Appellee's Petition for Rehearing A-26

F. Complaint A-27

G. Amendment to the Complaint A-35

H. Text of Constitutional Provision Relied on, United States Constitution, First Amendment A-37

I. Text of Statutes Relied On

Federal Power Act §205, 16 U.S.C. §824d ... A-38

Federal Power Act §206(a), 16 U.S.C. §824e (a) A-40

Sherman Act §1, 15 U.S.C. §1 ..... A-41

Sherman Act §2, 15 U.S.C. §2 ..... A-41

Clayton Act §2(a), as amended by Robinson-Patman Act, 15 U.S.C. §13(a) A-42

Clayton Act §4, 15 U.S.C. §15 ..... A-43

Clayton Act §11(a), as amended, 15 U.S.C. §21(a) A-43

Missouri Revised Statutes §393.130 ..... A-44

Missouri Revised Statutes §393.140 ..... A-45

Missouri Revised Statutes §393.150 ..... A-47

Missouri Revised Statutes §393.260 ..... A-48

Missouri Revised Statutes §393.270 ..... A-49

TABLE OF AUTHORITIES

Cases:

Ambook Enterprises v. Time, Inc., 612 F.2d. 604 (2d.Cir. 1979) 16

American Telephone & Telegraph Co. v. Delta Communications, Inc., 579 F.2d. 972 (5th.Cir. 1978), affirming 408 F.Supp. 1075 (S.D.Miss. 1976) 16

Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d. 1186 (5th.Cir. 1978), rehearing denied 570 F.2d. 1391 16

Baum v. Investors Diversified Services, Inc., 409 F.2d. 872 (7th.Cir. 1969) 16

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 5,6

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) 5,6,7,9,10,12

City of Gainesville v. Florida Power & Light Co., 488 F.Supp. 1258 (S.D. Fla. 1980) 17

City of Groton v. Connecticut Light and Power Co., 497 F.Supp. 1040 (D.Conn. 1980), affirmed in part, reversed in part 662 F.2d 921 (2d.Cir. 1981) .. 16

City of Lafayette, Louisiana v. Louisiana Power and Light Co., 435 U.S. 389 (1978) 8

City of Newark v. Delmarva Power & Light Co., 467 F.Supp. 763 (D.Dela. 1979) 16

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 5,6,7,8,9

Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976) 11,13

Federal Prescription Service, Inc. v. American Pharmaceutical Association, 663 F.2d. 253 (D.C.Cir. 1981) 8

Forro Precision, Inc. v. International Business Machines, 673 F.2d 1045 (10th.Cir. 1982) 9

Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) 10,11

Hydro-Tech. Corp. v. Sundstrand Corp., 673 F.2d. 1171 (10th.Cir. 1982) 8

May Department Stores Co. v. Union Electric Co., 341 Mo. 299, 107 S.W.2d. 41 (Mo. 1937) 13

Miracle Mile Associates v. City of Rochester, 617 F.2d. 18 (2d.Cir. 1980) 9

Otter Tail Power Co. v. United States, 410 U. S. 366 (1973).....9,10,12

Parker v. Brown, 317 U.S. 341 (1943) 9

United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) 5,6,7,8,9

Constitutional Provisions:

United States Constitution, First Amendment 2,4,5

Statutes:

Sherman Act §1, 15 U.S.C. §1 2,3

Sherman Act §2, 15 U.S.C. §2 2,3

Clayton Act §2(a), as amended by Robinson-Patman Act, 15 U.S.C. §13(a) 2,3,14,15

Clayton Act §11(a), as amended, 15 U.S.C. §21(a) 14,15

Missouri Revised Statutes (1978) 2

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNION ELECTRIC COMPANY,
Petitioner,

VS.

CITY OF KIRKWOOD, MISSOURI, a municipal corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Union Electric Company, respectfully prays that a Writ of Certiorari be issued to review the order and judgment and the opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on March 4, 1982, and with respect to which that court denied petitioner's Motion for Rehearing on March 31, 1982.

OPINIONS AND ORDERS BELOW

The opinion and judgment of the Court of Appeals, reported at 671 F.2d 1173 and at 1982-1 CCH Trade Cas. ¶64,574, are reproduced in the Appendix at p. A-1 and p. A-25 respectively. The December 31, 1980 Order and Memorandum of the District Court, not published, are reproduced at p. A-18 of the Appendix.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eighth Circuit were entered on March 4, 1982. The petitioner's Petition for Rehearing was denied on March 31, 1982. This Petition for a Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing.

CONSTITUTIONAL PROVISION INVOLVED

This Petition involves the constitutional issue of conflict between the First Amendment right to petition the government for a redress of grievances and the imposition of liability in damages for violation of the Sherman Act based solely on petitioner's exercise of its right to petition the federal and state regulatory agencies by filing its electric rate schedules for approval and by collection of the filed rates pursuant to federal and state statutes.

STATUTES INVOLVED

The Petition involves a determination whether there is an implied repeal with respect to antitrust injury caused by electric rates, of Sections 1 and 2 of the Sherman Act and Section 2 of the Clayton Act, by reason of Sections 205 and 206(a) of the Federal Power Act and Sections 393.130 through 393.270 of the Revised Statutes of Missouri, 1978, regulating rates charged by electric utilities in the respective federal and state jurisdictions. The Petition also involves a construction of the Robinson-Patman Act, Section 2(a) of the Clayton Act, as amended by 15 U.S.C. §13(a). These federal and Missouri statutes are set out in the Appendix at pages A-38 through A-50.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked by the Complaint alleging violations of Sections 1 and 2 of the Sherman Act, 15 USC §§ 1 and 2, and §2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 USC §13(a).

Union Electric Company (the "Company") is an electric utility engaged in the generation, transmission and distribution of electric energy for sale at both retail and wholesale. The City of Kirkwood, Missouri, a municipal corporation (the "City") has no generation facilities, but purchases electricity at wholesale from the Company and distributes it through its electric distribution system, which comprises approximately two-thirds of the area of the City. The Company distributes electricity at retail in the other one-third.

The Complaint

The complaint, as amended, seeks declaratory and injunctive relief and treble damages for alleged violations of Sections 1 and 2 of the Sherman Act and Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The Complaint, filed by the City on September 1, 1977, and amended on November 23, 1977, alleges that the Company monopolized and attempted to monopolize interstate trade and commerce in the retail distribution and sale of electric power. The City alleged that the Company, by its filings for wholesale and retail rate increases, with the Federal Power Commission (now the Federal Energy Regulatory Commission) and the Missouri Public Service Commission, respectively, created a "price squeeze" or disparity between the wholesale and retail electric rates, which prevented the City from selling power to its customers at the same rate charged by the Company to its retail customers.

Discovery disclosed that the City has participated actively, with other municipal customers, in the proceedings on the Company's wholesale rate filings before the federal Commission.

The Complaint also alleged violations of the *Robinson-Patman Act,* 15 U.S.C. §13(a). These claims were dismissed by the District Court on January 23, 1978, on the Company's motion on the grounds that electricity is not a "commodity" within the meaning of the statute, and that the Complaint did not suf-

ficiently allege sales occurring in interstate commerce. By its Motion of July 24, 1980, the City sought reconsideration of the Order of Dismissal, or in the Alternative, Leave to Amend. This Motion was never ruled.

Neither the Complaint nor the amendments to the Complaint, allege that petitioner engaged in improper or unlawful conduct other than the price-squeeze effect of its electric rates filed with the federal and state commissions.

District Court Decision

On December 31, 1981, the District Court granted summary judgment for the Company on the grounds that comprehensive federal and state regulation of the Company's wholesale and retail rates, respectively, exempted those rates from antitrust challenge, and that in addition, the First Amendment, as interpreted under the *Noerr-Pennington* doctrine, precluded antitrust liability based on the Company's activities in the filing of rate tariffs with the federal and state regulatory authorities and the collection of those rates. The Order of the District court is set out in the Appendix, at page A-18.

Court of Appeals Decision

The Court of Appeals rejected each of the legal grounds for the District Court's judgment and in addition held that electricity was a "commodity" within the meaning of the *Robinson-Patman Act*. The Court of Appeals reversed the summary judgment for the Company and remanded the cause for further proceedings in the District Court. The Opinion of the Court of Appeals is set out in the Appendix at page A-1; and published in 671 F.2d 1173.

ARGUMENT

I.

The Decision Below Is In Conflict With The Noerr-Pennington Decisions Of This Court By Its Holding That The First Amendment Protection From Antitrust Liability Is Lost If The Requests To The Government Achieve Anti-Competitive Results.

The District Court and the Court of Appeals dealt with this antitrust case as resting solely on the "price-squeeze" allegations. The Complaint as amended does not allege other conduct as grounds for antitrust violation, or that the rate filings by the Company were not made in good faith to obtain the requested increases.

In holding that the First Amendment right to petition the government does not protect the Company from risk of damages for antitrust violation arising solely from use of its filed rates because of anti-competitive results (the "price squeeze"), the opinion improperly limited the First Amendment constitutional right defined by this court in its *Noerr-Pennington* decisions: *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), 81 S.Ct. 523; *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), 85 S.Ct. 1585.

The opinion misinterprets the decisions of this Court in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), 92 S.Ct. 609, and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), 96 S.Ct. 3110, by relying on them in support of its conclusion that if the purpose or end-result of the petition for governmental action is anti-competitive, the First Amendment protection from antitrust damages is lost.

These conflicts with controlling decisions of the Supreme Court on the scope of the *Noerr-Pennington* doctrine are shown by the lower court's statement in its opinion (671 F.2d at 1181):

"*Noerr* protects the right to make one's views known to the government, but *Cantor* and *Trucking Unlimited* make clear that the right may not be used as a pretext to achieve otherwise unlawful results. "If the end result is unlawful, it matters not that the means used in violation may be lawful." *Trucking Unlimited,* 404 U.S. at 151. The Noerr-Pennington doctrine will not protect a utility which manipulates the federal and state regulatory processes to achieve anti-competitive results."

In fact, the quotation from *Trucking Unlimited,* relied on by the court, referred to the "sham" exception to the *Noerr-Pennington* doctrine, not to the doctrine itself. The basic holding of *Trucking Unlimited,* that the First Amendment protects petitions for governmental action even though the action sought and obtained may have direct anti-competitive results, is summarized in this statement by this Court:

> "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors." (404 U.S. at 510-511)

The court below apparently misconstrued this reference as meaning that a *genuine* exercise of First Amendment rights would not be protected if it had anti-competitive effects. As noted by the District Court in its order, there is no contention in the present case that the rate filings made by the Company with the Missouri Public Service Commission or with the Federal Energy Regulatory Commission were "sham", or that the City was harassed or deterred by the Company in any manner from access to the regulatory commissions to be heard in opposition to the rate filings. Accordingly, the "sham" exception to First Amendment protectin has no application. The Court of Appeals opinion created a new exception—that the First Amend-

ment right is lost if the result sought from the agency is "unlawful", i.e., anti-competitive—which would swallow the entire *Noerr-Pennington* doctrine. The essence of that doctrine is that a genuine exercise of the First Amendment right to petition the government is protected from antitrust liability "even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." (*United Mine Workers* v. *Pennington,* 381 U.S. 657, 85 S.Ct. 1585, at 1593.)

The opinion eliminates the *Noerr-Pennington* doctrine when the exercise of the First Amendment right is "to achieve anti-competitive results." That holding is in direct conflict with this Court's decisions which enunciated the doctrine, for there would be no need of the constitutional protection of the First Amendment from the antitrust laws if anti-competitive purpose or results were not present.

The lower court's reliance on *Cantor* as limiting the scope of *Noerr-Pennington* is not justified. The only reference in *Cantor* to the *Noerr-Pennington* doctrine, including the quotation used in the lower court's opinion, is in part IV of the *Cantor* opinion which was not concurred in by a majority of the Justices. The *Cantor* decision did not turn on the *Noerr-Pennington* doctrine, as shown by this Court's statement of its conclusion (428 U.S. at 598):

> "We conclude that neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program."

We have not found any later decision which cited *Cantor* as limiting the *Noerr-Pennington* doctrine. On the contrary, there are decisions of this Court and of other circuit courts holding that a genuine exercise of the First Amendment right to petition

the government is protected from antitrust liability regardless of anti-competitive purpose or result. In *City of Lafayette, Louisiana* v. *Louisiana Power and Light Co.*, 435 U.S. 389, 98 S.Ct. 1123 (1978), this Court described the *Noerr* holding as follows (at page 1129):

> "In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 128, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), the Court held that, regardless of anti-competitive purpose or intent, a concerted effort by persons to influence lawmakers to enact legislation beneficial to themselves or detrimental to competitors was not within the scope of the antitrust laws."

In the same case this Court summarized the *Pennington* decision:

> "*Pennington* held that, regardless of the anticompetitive purpose or effect on small competing mining companies, the joint action of certain large mining companies and labor unions in lobbying before the Secretary of Labor in favor of legislation establishing a minimum wage for employees of contractors selling coal to the Tennessee Valley Authority and in lobbying before TVA to avoid coal purchases exempted from the legislation was not subject to antitrust attack." (at page 1129, footnote 17)

The unique modification of the *Noerr-Pennington* doctrine by the Court below is in conflict also with a number of decisions in other circuits, exemplified by: *Federal Prescription Service, Inc.* v. *American Pharmaceutical Association*, 663 F.2d 253 (1981), where the District of Columbia Circuit rejected the contention that anti-competitive intent removes the protection of *Noerr; Hydro Tech Corporation* v. *Sundstrand Corporation*, 673 F.2d 1171 (1982), in which the Tenth Circuit upheld the *Noerr-Pennington* immunity from antitrust liability even

though the purpose of the challenged conduct was admittedly anti-competitive; *Forro Precision, Inc.* v. *International Business Machines,* 673 F.2d 1045 (1982), where the Ninth Circuit applied the *Noerr-Pennington* doctrine to communications with police even though made with anti-competitive intent; *Miracle Mile Associates* v. *City of Rochester,* 617 F.2d 18 (1980), where the Second Circuit held that anti-competitive intent and results do "not eradicate the First Amendment protections which underlie the *Noerr-Pennington* doctrine." (at page 21).

• • •

This Court's review of the Eighth Circuit's decision is necessary because the holding below is in conflict with the applicable decisions of this Court on an important matter of federal law and constitutional protection.

II.

In Holding That The Antitrust Laws Apply Where The Only Violation Alleged Is The Effect Of The Electric Rates Filed With The Federal And State Regulatory Commissions, The Decision Below Conflicts With The Principles Of Implied Repeal, Set Out In Gordon v. New York Stock Exchange, And Of State-Action Exemption, Set Out In Parker v. Brown.

This Court has ruled that the intensive regulations of the electric power industry by the Federal Power Act and by the statutes of the various states does not confer any general exemption or immunity from the federal antitrust laws (*Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973), 96 S.Ct. 1022, *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579, 96 S.Ct. 3110 (1976).) The alleged violations of the antitrust laws in those cases involved various activities other than the filed electric rates. As the challenged conduct was not authorized or required by federal or state law, the Court considered it outside the principles upon which the rules of implied repeal and state action are based.

This Court has not ruled on the different question presented by the present case: whether antitrust liability in damages may be imposed upon an electric utility where the alleged violation is based *solely* on the economic effect of its rates filed with the respective federal and state commissions. The court below erred in applying the decisions of this Court in *Otter Tail* and *Cantor* to the significantly different facts of the present case, and in failing to follow the decision of this Court in *Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 96 S.Ct. 2598 (1975), which is this Court's decision closest to the present case in dealing with regulated prices as an antitrust violation.

The Implied Repeal Issue

The doctrine of implied repeal of the antitrust laws has been expressed by this Court in the context of a variety of legislative provisions. If there is a plain repugnancy between the antitrust and the regulatory provisions, repeal or immunity for the specific conduct authorized or compelled by the statute will be implied. In *Gordon,* this Court held that the setting of commission rates by the New York Stock Exchange pursuant to the rules and active supervision of the S.E.C. was not subject to the antitrust laws although the specific conduct under antitrust attack was price fixing among competitors, which would be a per se violation absent implied immunity. The Court found a repugnancy between the regulation of commission rates by the S.E.C. under the Securities Exchange Act and subjecting those regulated rates to the decisions of courts and juries in private antitrust suits. The Court said (422 U.S. at 689):

> "It is clear from our discussion in Part III, *supra,* that the commission rate practices of the exchanges have been subjected to the scrutiny and approval of the S.E.C. If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or

of the S.E.C. Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the S.E.C. must consider, in addition, the economic health of the investors, the exchanges, and the securities industry. Given the expertise of the S.E.C., the confidence the Congress has placed in the agency, and the active roles the S.E.C. and the Congress have taken, permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement that scheme."

The quoted language, and the rule of *Gordon,* are applicable to the present case but were not followed by the court below. FERC's statutory regulation of the Company's wholesale rates (including its responsibility to consider the anti-competitive effects of a potential price squeeze as required by the *Conway* decision), is more direct and complete than was the authority of the S.E.C. over commission rates. The complexity of the factors to be considered in determining a "just and reasonable" wholesale electric rate is much greater than the determinants of appropriate commissions on the sale of securities. Electric rates involve analysis of complex and technical engineering and accounting factors, in addition to the exercise of expert judgment on economic and investment questions. In reaching its determination, the agency must reconcile the objectives of the Act in setting fair and nondiscriminatory rates for the user and in preserving the ability of the utility to obtain sufficient revenues for reliable, safe service for the public and a reasonable return to the investors who furnish the necessary capital.

To allow an individual member of the wholesale class, such as the City, to attack the validity of the filed rate or the rate as finally determined by FERC, by an antitrust action asserting damages by reason of the rate itself, clearly would interfere with the regulatory process and disrupt the statutory scheme of

uniformity of rate for customers of the same class. A decision on this antitrust claim of damages caused by the Company's filed rate necessarily requires a determination by the trial court or jury of what the proper wholesale rate should be. Such determination has been vested by Congress in the sole jurisdiction of the federal agency, subject to court review only on appeal from the order fixing the rate.

The Court below failed to recognize the essential fact differences in *Otter Tail* and in *Cantor* from the present case. In those cases the Court was dealing with challenged conduct which was unrelated to the regulation of rates and in both cases the Court found no repugnancy between the application of the antitrust laws to the challenged conduct and the effective working of the statutory, regulatory scheme.

It is obvious that rate regulation, unlike the furnishing of free light bulbs as in *Cantor,* and the engaging in baseless, repetitive litigation and similar activities as in *Otter Tail,* is central to the regulatory scheme of the Federal Power Act and of the Missouri Public Service Commission law. It is clear that the state and federal commissions are the key deciding forces in determining the legal rates which can be charged in the respective jurisdictions. In each instance, the governmental agency approves or fixes the legal rate so as to displace the antitrust law with respect to any injury claimed to be inflicted by the rates alone.

The State Action Issue:

The Court below rejected the doctrine of state-action in the present case on the ground that the facts in the instant case cannot be distinguished from those in *Cantor,* and because the alleged price squeeze violation does not satisfy the two criteria this Court set out in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937 (1980). The Court ignored the fact that the challenged conduct

in *Cantor* was irrelevant to the central function of the state regulatory statute and that the state's interest in regulating the distribution of electricity would not be impaired by an antitrust suit concerning the light bulb program as to which the state policy was neutral.

In contrast, the regulation of rates is central to the Missouri regulatory scheme and the PSC actively regulates the rate-making process and fixes the legal rates to be charged. The Missouri Supreme Court has declared that the state's public service law, particularly its rate-making sections, are meant to be a substitute for competition:

> "This law was the result of growing feeling that such competition, as existed in this field, was inadequate to protect the public. It provided, in lieu of competition and the right of private bargaining, impartial treatment of every one under regulations approved and enforced by the state .... that state regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility owner, must be in the name of the overlord, the state, and to be effective must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisibly) reflected in rates and quality of service."
>
> (*May Department Stores Co.* v. *Union Electric Company* 107 S.W.2d 41 at 48 (Mo. S.Ct. 1937)

The Court below misapplied the *Midcal* tests by assuming that the anti-competitive "price squeeze" is within the control of the Company, independent of the actions of the regulatory agency, and that there is no active supervision of the problem. The Eighth Circuit, without justification, belittled the fact that under this Court's *Conway* decision, FERC must consider the relationship of the two rates and must adjust the federal rate to the lower zone of reasonableness where necessary to correct a

disparity. As FERC carries out this responsibility in its rate hearings (including its proceedings involving the rates in issue in the present case), a continuing price squeeze can result only because the state-set rate is too low. In fact, the Complaint in the present case, in paragraph 12-A, alleges that the unreasonable and discriminatory levels of the Company's retail rates are the cause of the price squeeze. As the retail rates are set by the Missouri commission, and not by the Company, the rates are state-action. Under the state-action doctrine, the Company cannot be liable under the antitrust laws either for the rates fixed by the state or for an indirect effect upon the plaintiff which the Company cannot control.

Contrary to the statement of the Court below, in the circumstances of the present case the conjunction of federal and state regulation has caused the existence of a relation between the two rates which is the subject of the Complaint. As the state action is the effective cause, the Court's rejection of the doctrine is contrary to *Midcal* and requires review by this Court.

III.

The Decision That Electricity Is A "Commodity" Under The Robinson-Patman Act Presents An Important Question Of Federal Law Which Should Be Settled By This Court.

The question whether electricity is a "commodity" within the meaning of the *Robinson-Patman* Act has not yet been ruled by this Court and has received divided treatment in the lower federal courts. If, as the Eighth Circuit held, the sale of electricity falls within the *Robinson-Patman* Act, there is an apparent conflict between the Federal Power Act, which vests the Federal Power Commission, and its successor, the Federal Energy Regulatory Commission, with responsibility for review of electric rates, and the *Robinson-Patman* Act which gives to the Federal Trade Commission authority to review prices of all other enterprises except those specifically assigned in §21(a) to a

particular agency. The Federal Trade Commission is not charged with the regulation of any other aspects of the electric industry and has no particular expertise in that area. It is unreasonable to assume that Congress in enacting the *Robinson-Patman* Act in 1936 intended to subject electric rates to the authority of the Federal Trade Commission when in 1935 it had delegated that responsibility to the Federal Power Commission, a special agency created for the purpose of regulating the electric power industry.

The decision below is contrary to the language and history of the statute and to the weight of authority concerning the definition of "commodities". Section 2(a) of the *Clayton* Act, as amended by the *Robinson-Patman* Act forbids direct or indirect discrimination in price "between different purchasers of commodities of like grade and quality ..." The terms "like grade and quality" are appropriate in referring to goods, wares and merchandise, but not with respect to electricity. The House and Senate reports which accompanied the original *Clayton* Act use the words "goods, wares and merchandise" interchangeably with "commodities". H.R. Rep. No. 627, 63rd Cong., 2d Sess. 8, 11 (1914); S. Rep. No. 698, 63rd Cong., 2d Sess. (1914). There is no indication that the *Robinson-Patman* Act was intended to broaden the scope of the statute to include electricity as a "commodity". One year prior to the passage of the *Robinson-Patman* Act in 1936, the Congress had amended the Federal Power Act to provide for F.P.C. review of all rates charged for the transmission or sale of electric power subject to its jurisdiction, including review of any disparity in rate between categories of purchaser so as to prohibit unreasonable discrimination. The *Robinson-Patman* Act, 15 U.S.C. §13(a) gives authority to fix and establish quantity limits as to "particular commodities or classes of commodities" not to the Federal Power Commission, but to the Federal Trade Commission. The Act at 15 USC §21(a) gives authority to enforce compliance with §13(a) to the various federal agencies having

regulatory authority over the type of entity charged with a violation. Thus the Interstate Commerce Commission has authority with respect to common carriers, the Federal Communications Commission with respect to carriers engaged in wire or radio transmissions, the Civil Aeronautics Board with respect to air carriers, the Federal Reserve Board with respect to banks, and the Federal Trade Commission where applicable to all other character of commerce. The omission of any reference to the Federal Power Commission, together with the Federal Power Act's entrustment of electric rate review to the Federal Power Commission, indicate clearly that Congress did not intend that the *Robinson-Patman* Act be applied to rates for electric service.

The Courts of Appeal have held that the term "commodity" is "restricted to products, merchandise or other tangible goods." *Baum* v. *Investors Diversified Services, Inc.*, 409 F.2d 872, 874-875 (7 Cir., 1969). The dominant nature of the transaction determines whether it is the sale of commodities, and where a transaction involves a substantial element of service, it is not covered by the Act. *Aviation Specialties, Inc.* v. *United Technologies Corp.*, 568 F.2d 1186 (5 Cir., 1978), rehearing denied, 570 F.2d 1391; *Ambook Enterprises* v. *Time, Inc.*, 612 F.2d 604,609 (2 Cir., 1979).

The Fifth Circuit in *American Telephone and Telegraph Company* v. *Delta Communications, Inc.*, 579 F.2d 972 (1978) adopted the opinion of the District Court at 408 F. Supp. 1075, 1114 (S.D.Miss. 1976) holding that the transmission of network television signals by cable, which involves electricity, is not the sale of a commodity within the meaning of the Act.

Two District Courts have considered this question and held that electricity is not a "commodity" under the *Robinson-Patman* Act: *City of Newark* v. *Delmarva Power and Light Co.*, 467 F.Supp. 763 (1979) D.Dela., followed by the District Court in Connecticut in *City of Groton* v. *Connecticut Light and*

Power Co., 497 F.Supp. 1040 (D.Conn., 1980). The Eighth Circuit, without discussion of the legislative history or of the specific language of the *Robinson-Patman* amendment held that electricity is a commodity for this purpose. The Court cited in support the District Court opinion in *City of Gainesville* v. *Florida Power and Light Company*, 488 F.Supp. 1258, (S.D.Fla., 1980), which viewed electricity as similar to "other forms of energy" which have been held to be within the Act, such as coal and gasoline. Apart from the legislative history, the flaw in this reasoning is that coal and gasoline are fuels which have "grade and quality" which can be determined and compared, which is not true of electric energy.

CONCLUSION

The Court's review of this case is needed to clarify the law in the important areas of (1) the proper scope of the *Noerr-Pennington* doctrine when electric utilities (and other regulated entities) are charged with antitrust liability due solely to rates filed in good faith with governmental agencies; (2) the application of the principles of implied repeal and state-action exemption to the conflict between the antitrust laws and the regulation of electric rates, where the only violation claimed is a price-squeeze caused by the rates filed with the regulatory agencies; and (3) whether Congress intended the *Robinson-Patman* Act to supplant, or supplement, the jurisdiction of the Federal Power Commission and the state public service commissions over the fairness of electric rates, by granting such authority to courts and juries in price discrimination actions.

The errors of the Court below on these issues require review by this Court to correct the improper result reached in the present case, and to forestall similar confusion in numerous other cases.

Respectfully submitted,

Robert F. Schlafly
Charles G. Siebert
Ann E. Buckley
SCHLAFLY, GRIESEDIECK,
FERRELL & TOFT
314 North Broadway, Suite 1300
St. Louis, Missouri 63102
(314) 421-0845
Counsel for Petitioner

APPENDIX

Page

A. Opinion of the Court of Appeals, March 4, 1982.... A-1

B. Order of the District Court, December 30, 1980..... A-18

C. Memorandum of the District Court, December 30, 1980. ..... A-19

D. Order and Judgment of the Court of Appeals, March 4, 1982. ..... A-25

E. Order of the Court of Appeals Denying Appellee's Petition for Rehearing..... A-26

F. Complaint. A-27

G. Amendment to the Complaint. A-35

H. Text of Constitutional Provision Relied On:

United States Constitution, First Amendment..... A-37

I. Text of Statutes Relied On:

Federal Power Act §205, 16 U.S.C., §824d (as in effect at time of filing of Complaint). A-38

Federal Power Act §206(a), 16 U.S.C. 824e(a)..... A-40

Sherman Act §1, 15 U.S.C. §1. ..... A-41

Sherman Act §2, 15 U.S.C. §2. ..... A-41

Clayton Act §2(a), as amended by Robinson-Patman Act, 15 U.S.C. §13(a). A-42

Clayton Act §4, 15 U.S.C. §15 (as in effect at time of filing of Complaint). A-43

Clayton Act §11(a), as amended, 15 U.S.C. §21(a). A-43

Missouri Revised Statutes. A-44

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1521

City of Kirkwood, a Municipal
Corporation,
Appellant,

v.

Union Electric Company, a
Corporation,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: November 10, 1981

Filed: March 4, 1982

Before HENLEY and ARNOLD, Circuit Judges, and NICHOL,* Senior District Judge.

---

* The Hon. Fred J. Nichol, Senior United States District Judge for the District of South Dakota, sitting by designation.

ARNOLD, Circuit Judge.

The plaintiff, City of Kirkwood, Missouri (Kirkwood), appeals from the District Court's order granting summary judgment in this antitrust action to the defendant, Union Electric Company (UE). Kirkwood, which buys electricity from UE, alleges that UE violated the antitrust laws[1] primarily through creating and maintaining an anti-competitive "price squeeze." The principal issue on appeal is whether the District Court was correct in concluding that the alleged price squeeze is protected from antitrust attack by the exclusive jurisdiction of certain state and federal regulatory agencies, the filed-rate doctrine, the state-action doctrine, and the *Noerr-Pennington* doctrine. We do not agree that UE is immunized from antitrust liability by any of these doctrines, and therefore we reverse.

---

[1] Specifically, Kirkwood alleges violations of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2 (1976), and §2(a) of the Clayton Act, 15 U.S.C. §13(a) (1976), as amended by the Robinson-Patman Act. The statutes provide, in relevant part:

> Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal. . . .

15 U.S.C. §1.

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a felony. . . .

15 U.S.C. §2.

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce,

I.

Kirkwood is a municipal corporation which sells electric power at retail to customers in approximately two-thirds of its geographical area. Kirkwood does not itself produce electricity, but instead buys it at wholesale from UE. UE is an electric utility which produces, transmits, and delivers electric power to both wholesale and retail customers in Missouri, Iowa, and Illinois. UE supplies all of Kirkwood's wholesale electric-power requirements and provides retail electric service to one-third of Kirkwood's area.[2]

UE's wholesale and retail rates are each subject to governmental regulation. Under the Federal Power Act, 16 U.S.C. §§824 *et seq.* (1974), the Federal Energy Regulatory Commission (FERC)[3] regulates wholesale sales of electric power in interstate commerce, such as the sales from UE to Kirkwood. The FERC is required to ensure that all rates and charges within its jurisdiction are just and reasonable. 16 U.S.C. §824d(a). When

---

> where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . ..

15 U.S.C. §13(a).

[2] Kirkwood and UE each have exclusive retail electric distribution rights within their respective portions of the city. The ⅔-⅓ allocation of Kirkwood's area is provided for in Kirkwood's Wholesale Electric Service Agreement with UE.

[3] The Federal Power Commission (FPC) exercised regulatory control over utility rates prior to October 1, 1977, but as of that date its functions and responsibilities were transferred to the FERC and the Secretary of Energy.

a utility desires to increase (or decrease) its wholesale rates, it must file a proposed rate schedule with the FERC. Implementation of the increase may be suspended for up to seven months, 16 U.S.C. §824d(d), (e), but if the FERC delays action on a proposal for more than seven months, it automatically goes into effect, subject to refund if the FERC later determines the increase to be unlawful.

UE's retail rates are regulated by the Missouri Public Service Commission (PSC) pursuant to Mo. Ann. Stat. ch. 393 (Vernon 1975). Like the Federal Power Act, the Missouri statute prohibits rates which are unjust, unreasonable, unjustly discriminatory, or unduly preferential. Mo. Ann. Stat. §393.140(5). In Missouri, an increase in retail rates cannot go into effect until after the PSC approves it, but the PSC must act on rate applications no later than eleven months after filing. Mo. Ann. Stat. §393.150.

Kirkwood filed its complaint on September 1, 1977, alleging that UE violated the Sherman and Robinson-Patman Acts. Kirkwood charges that UE's wholesale rate increases in past years (particularly its 33.72% increase in 1975) in conjunction with its smaller and deferred increases in retail rates have created a "price squeeze" placing Kirkwood at a competitive disadvantage.[4] Because the wholesale rate Kirkwood paid to UE following these rate increases exceeded the retail rate paid by UE's large industrial primary service customers, Kirkwood asserts that it suffered competitive injury. Specifically, Kirkwood claims that it has been unable to attract large industrial customers to settle in its retail distributional area. In addition, Kirkwood complains that it has encountered increasing pressure to close down its electric power distribution operation and to sell or lease it to UE.

---

[4] A price squeeze occurs when a vertically integrated company which has monopoly power at the wholesale level but faces competition at the retail level sets its wholesale rates so high that its wholesale customers will be unable to compete with it in the retail market. See *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 436-48 (2d Cir. 1945).

Aside from the price squeeze, Kirkwood contends UE committed several other antitrust violations, including price discrimination, maintenance of a territorial restriction, refusal to "wheel" power,[5] and refusal to set a transmission rate for Kirkwood.[6] In essence, Kirkwood's complaint charges that UE has a regional monopoly over the wholesale supply of electric power, and that UE has conspired with its affiliates primarily through the price-squeeze mechanism to eliminate the retail competition posed by small municipal utilities such as Kirkwood.

On January 23, 1978, the District Court granted UE's motion to dismiss Kirkwood's Robinson-Patman Act claim on the ground that electricity is not a commodity and that the complaint did not sufficiently allege sales occurring in interstate commerce. On July 24, 1980, Kirkwood asked the court to reconsider the dismissal, or in the alternative to allow Kirkwood to amend its complaint to correct its supposed defects. The court never ruled on Kirkwood's motion, but instead disposed of the entire matter on December 31, 1980, by granting UE's motion for summary judgment as to the entire complaint. This appeal followed.

II.

The District Court's order granting UE summary judgment treats Kirkwood's case as resting solely on its price-squeeze

---

[5] "Wheeling" power refers to transmitting power sold by one utility to another over the lines of a third utility not involved in the sale.

[6] There is some dispute over whether any of the claims other than the price squeeze were adequately pleaded in Kirkwood's complaint. On remand, plaintiff should move for leave to amend its complaint to assert these claims clearly. "[L]eave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

allegation,[7] and indeed that is the principal basis of the complaint. The District Court decided that the price squeeze could not be the basis of antitrust liability for three reasons: (1) UE's wholesale and retail rates fall under the exclusive regulatory authority of federal and state agencies, and a court's award of antitrust damages for a price squeeze would conflict with the principle that no utility may deviate from its filed rates; (2) because UE's rates are subject to pervasive regulation, they fall within the state-action antitrust exemption; and (3) the First Amendment immunizes UE's actions in pertaining for rate increases. We respectfully disagree on each of these points.[8]

A. Exclusive Jurisdiction And The Filed-Rate Doctrine

The exclusive-jurisdiction argument rests on the idea that because regulatory commissions were created to monitor the reasonableness of utility rates, they alone should be responsible for remedying unjust and discriminatory rates. Under this

---

[7] The opinion refers to the earlier dismissal of the Robinson-Patman Act claim, but does not mention any of the other alleged antitrust violations.

[8] Several other courts have recently considered price-squeeze cases. The two courts of appeals and two of the three district courts faced with the issue came to the same conclusion we do, namely that a municipality's price-squeeze claim is cognizable under the antitrust laws. *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981); *City of Mishawaka* v. *Indiana & Mich. Elec. Co. (Mishawaka I)*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *City of Mishawaka* v. *American Elec. Power Co. (Mishawaka II)*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *Borough of Ellwood City, Pennsylvania* v. *Pennsylvania Power Co.*, 462 F. Supp. 1343 (W.D. Pa. 1979); *City of Shakopee* v. *Northern States Power Co.*, Civ. No. 4-75-591 (D. Minn. Oct. 18, 1976). *Contra, City of Newark* v. *Delmarva Power & Light Co.*, 467 F. Supp. 763 (D. Del. 1979). For a law-review article considering the price-squeeze issue in depth, see Note, *The Applicability of Antitrust Laws to Price Squeezes in the Electric Utility industry*, 54 St. John's L. Rev. 103 (1979).

analysis, Kirkwood's sole avenue for challenging the price squeeze would be through participating in regulatory hearings on proposed rates, an avenue which has thus far yielded Kirkwood little relief.[9]

The Supreme Court has in the past held certain practices of highly regulated industries to be exempt from antitrust liability because of congressional intent, express or implied, that such industry-specific regulation supersede antitrust regulation for those industries. See, *e.g.*, *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). The Federal Power Act does not contain an express antitrust exemption, but UE argues exemption should be implied from the pervasiveness of the regulatory scheme covering electric utilities. While it is true that the electric-power industry is subject to extensive government regulation, the Supreme Court has announced that "since our decision in *Otter Tail Power Co.* v. *United States*, [410 U.S. 366 (1973),] there can be no doubt about the proposition that the federal antitrust laws are applicable to electrical utilities." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 596 n.35 (1976).[10]

---

[9] Kirkwood has appeared before the FERC to challenge UE's proposed wholesale rate increases, to no avail. Moreover, once the FERC approves rate increases, it has no power to invalidate rates retroactively or order other relief if the rates are later found to be unreasonable. 16 U.S.C. §824d(e). In addition, FERC cannot remedy Kirkwood's problem on its own. Neither it nor the Missouri PSC has jurisdiction over the relationship as such between wholesale and retail rates. It is this relationship, rather than the unreasonableness of either the wholesale or the retail rate structure standing alone, that creates the problem of which Kirkwood complains.

[10] In *Otter Tail* the Supreme Court held a utility's refusal to wheel subject to antitrust challenge, and in *Cantor* the Court denied antitrust immunity to a utility which distributed "free" light bulbs to residential consumers. The plaintiff in *Cantor*, who sold light bulbs at retail, claimed that tying the distribution of a non-monopoly item (light bulbs) to a monopoly item (electricity) constituted illegal use of monopoly power to restrain competition. Although Detroit Edison's

As the *Cantor* opinion recognizes, past precedent cautions that the courts should be reluctant to imply antitrust immunity. See 428 U.S. at 597. "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963) (footnotes omitted). Furthermore, " '[r]epeal is to be regarded as implied only if necessary to make [the regulatory statute] work, and even then only to the minimum extent necessary.' " *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 683 (1975) (quoting *Silver* v. *New York Stock Exchange, supra*, 373 U.S. at 357).[11]

The Supreme Court applied these principles to the electric-power industry in *Otter Tail* and in *Cantor* and concluded that the electric-utility regulatory scheme[12] and the antitrust laws are not "plainly repugnant" to one another. On the contrary, the regulatory and antitrust provisions are complementary to a degree. They share the common goal of eliminating unjust and discriminatory prices, though their ranges of authority and remedies differ. With respect to the case at bar, the FERC and PSC each has authority over only one end of the alleged price squeeze, while the antitrust laws can address the entire problem. In *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976), the Supreme

---

light-bulb-exchange program was part of an approved tariff and therefore could not be altered without the approval of the Michigan Public Service Commission, the Court refused to imply immunity on that basis.

[11] This Court recently summarized these and other implied-immunity cases in *Sound, Inc.* v. *American Tel. & Tel. Co.*, 631 F.2d 1324, 1327-31 (8th Cir. 1980) (no implied immunity for telecommunications industry under the Federal Communications Act of 1934).

[12] *Otter Tail* considered federal utility regulation, while *Cantor* was concerned with state regulation of electric utilities.

Court directed the FERC to consider potential anti-competitive effects of price squeezes when evaluating proposed wholesale-rate increases, but *Conway* does not hold that the FERC has exclusive jurisdiction over price squeezes.[13] Enforcing the antitrust laws is not the FERC's paramount objective, and the only remedy the FERC can grant is to reduce the wholesale price to the lower end of the "zone of reasonableness," 426 U.S. at 279 (quoting *Conway Corp.* v. *Federal Power Comm.*, 510 F.2d 1264, 1274 (D.C. Cir. 1975)), which, depending on where the retail price is set, may or may not be enough to eliminate a price squeeze. Prior to *Conway*, the FERC refused to take price squeezes into account because of its inability to control retail rates. *Conway* does not change the fact that neither the FERC nor the PSC can exercise jurisdiction over the entire price-squeeze situation.

We conclude that the FERC and PSC do not have exclusive jurisdiction over Kirkwood's price-squeeze claim. Nonetheless, UE asserts that even if the goals of the antitrust and utility regulatory schemes are complementary, the potential remedies conflict. According to UE, Kirkwood may not receive antitrust damages based on the price squeeze because such an award would contravene the filed-rate doctrine, which "forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co.* v. *Hall (Arkla)*, ___ U.S. ___, 101 S. Ct. 2925, 2930 (1981) (state court could not award damages in breach-of-contract action based on a rate never filed with the FERC).[14] This doctrine was applied in an

---

[13] *See Mishawaka I*, 560 F.2d at 1319 ("Nothing in the Supreme Court's opinion in *Conway* suggests exclusive jurisdiction . . .").

[14] Although *Arkla* demonstrates the current vitality of the filed-rate doctrine, the case is clearly distinguishable from the facts of the instant case. In *Arkla*, the Supreme Court faced a conflict between state contract law and federal rate regulation and decided that the latter

antitrust context in *Keogh* v. *Chicago & Northwestern Railway*, 260 U.S. 156 (1922) (shipper could not recover antitrust damages based on illegal combination of carriers to fix rates where rates approved by ICC).

The filed-rate doctrine does not preclude antitrust liability in the case at bar. An award of antitrust damages for a price squeeze would not conflict with the doctrine's purpose, which is to ensure rate uniformity by confining the authority to oversee the reasonableness of rates to a single regulatory agency. See *Arkla*, 101 S. Ct. at 2930. In *Arkla*, the plaintiffs directly attacked rates which a regulatory agency had found to be reasonable, and the Supreme Court resolved the conflict in favor of the agency's determination of reasonableness. In contrast, Kirkwood does not quarrel with the reasonableness determinations of the FERC and PSC as to any individual wholesale or retail rate. Instead, Kirkwood complains of anti-competitive effects resulting from the interaction of rates which, taken separately, may be reasonable. As discussed above, neither the FERC nor the PSC has plenary authority over the interaction of wholesale and retail rates, because each commission can affect only one category of those rates. Thus, neither an award of antitrust damages nor the granting of properly conditioned injunctive relief for the price squeeze would interfere with either commission's regulatory authority. The Seventh Circuit adopted this analysis in *Mishawaka I:*

> If plaintiffs prove their case, instead of interfering with any rates approved by the Federal Power Commission, in addition to possible damages, the district court would

---

preempted the former. "[U]nder the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate controls." 101 S. Ct. at 2933. Here we have a claimed conflict between federal rate regulation and federal antitrust regulation, and Supremacy Clause considerations do not come into play when a court balances competing federal rules.

> presumably order defendant to file a new wholesale rate application that would remove the disparity between the rates charged plaintiffs and defendant's industrial customers. The court would thus not be awarding a remedy that would "starkly conflict with the explicit statutory mandate of the Federal Power Commission * * * [or] improperly preemp[t] the jurisdiction of the Federal Power Commission * * *."
>
> . . . [I]t would not disrupt the regulatory process to award damages for any past anti-competitive conduct proved at trial.

560 F.2d at 1323-24 (quoting *Otter Tail*). In sum, the courts may consider a price-squeeze claim without infringing on the regulatory jurisdiction of the FERC and PSC, because the question is not whether the rates themselves are anti-competitive, but whether the defendant utility acted illegally in proposing a certain anti-competitive combination of rates.

Another consideration bolsters our conclusion that the filed-rate doctrine does not apply. The Third Circuit noted in *Essential Communications Systems, Inc.* v. *American Telephone & Telegraph Co.*, 610 F.2d 1114, 1121 (3d Cir. 1979) that the doctrine was created to protect customers, not competitors. "[T]he filed tariff rule has little or nothing to do with AT&T's duties under the antitrust laws toward its competitors . . .; competitors are not the intended beneficiaries of that rule of public utility regulation." See also *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 487 F. Supp. 942, 951 (S.D.N.Y. 1980). Kirkwood alleges that it has been injured as a competitor, not as a customer, though it stands in both relations to UE. A rule formulated to ensure uniformity of rates as between customers should not give an unfair advantage to a utility in its dealings with competitors.

B. State action

The District Court's second ground for granting summary judgment was that UE's wholesale and retail sales are immune to antitrust challenge under the state-action exemption articulated in *Parker* v. *Brown*, 317 U.S. 341 (1943). *Parker* involved an antitrust challenge to an agricultural marketing program in California which the state designed to stabilize market prices for commodities, including raisins. The Supreme Court held that Congress did not intend the Sherman Act "to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-51.

Subsequent cases interpreting *Parker* make clear that the state-action antitrust exemption does not encompass all action taken under color of state law. For example, in *Cantor* v. *Detroit Edison Co., supra*, the fact that the defendant utility's light-bulb-exchange program was contained in an approved tariff and therefore could not be continued without the regulatory commission's permission did not confer antitrust immunity on the utility. The Supreme Court found that Michigan's regulatory policy was neutral with regard to whether such a program should exist. Considering this regulatory neutrality in conjunction with the fact that Detroit Edison itself contributed substantially to the decision to adopt the program, the Supreme Court decided Detroit Edison should be held responsible for any resulting violation of the Sherman Act. "[N]otwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision." 428 U.S. at 593.

More recently, in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Supreme Court set forth two criteria for applying the state-action exemption. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the States

itself." 445 U.S. at 105 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion of Brennan, J.)). UE's alleged price squeeze does not satisfy either of the *Midcal* criteria.[15] First, while in *Midcal* the Court found an affirmative legislative policy to permit resale price maintenance (which was the challenged restraint), here the legislative policy does not authorize or encourage the challenged anti-competitive price squeeze. Instead, the FERC and PSC are both enjoined to seek out and eliminate discriminatory prices. Second, while UE's individual wholesale and retail rates are "actively supervised" by the FERC and PSC, Kirkwood challenges the interrelation of those rates, which is under the authority of neither Commission. Although under *Conway*, the FERC is supposed to consider price-squeeze claims, given its limited power and disposition[16] to remedy them, its consideration of such claims hardly amounts to "active supervision."

---

[15] This Court in a recent review of the state-action doctrine concluded that the following factors are relevant to a determination of whether the exemption applies:

> the existence and nature of any relevant statutorily expressed policy; the nature of the regulatory agency's interpretation and application of its enabling statute, including the accommodation of competition by the regulator; the fairness of subjecting a regulated private defendant to the mandates of antitrust law; and the nature and extent of the state's interest in the specific subject matter of the challenged activity.

Sound, Inc. v. *American Tel. & Tel. Co.*, 631 F.2d at 1334. Because we find *Cantor* and *Midcal* to be dispositive on the issue, we do not go into all of these factors in detail.

[16] In the briefs filed by the FERC in relation to the petitions for certiorari in *Mishawaka I* and *Mishawaka II*, the FERC expressed its view that antitrust claims (such as price squeezes) can be more effectively and appropriately tried before the courts and thus should not be considered by regulatory commissions. See Brief for United States as *Amicus Curiae*, *Ind. & Mich. Elec. Co.* v. *City of Mishawaka*, 436 U.S. 922 (1978) at 10-11; Brief for the United States and the FERC as *Amicus Curiae*, *American Electric Power Co.* v. *City of Mishawaka*, 449 U.S. 1096 (1981) at 10.

C. Noerr-Pennington

The district court's third reason for granting UE summary judgment was that UE's activities in filing rate requests with the FERC and PSC are protected from antitrust liability by the First Amendment under *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965) (concerted efforts to influence public officials shielded from Sherman Act), and *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) (Sherman Act does not prohibit attempts to influence passage or enforcement of laws). The *Noerr-Pennington* doctrine protects the First Amendment right to petition government authorities, but later cases demonstrate that the First Amendment does not immunize all attempts to manipulate the government for anti-competitive ends. See, *e.g., Cantor* v. *Detroit Edison Co., supra* (light-bulb-exchange program approved in tariff not immune to antitrust challenge); *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972) (attempt to monopolize transportation of goods by filing suits against aspiring competitors not immune from antitrust laws).

The facts in the instant case cannot be distinguished from those in *Cantor,* in which the Supreme Court held that "nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct." 428 U.S. at 601-2. *Noerr* protects the right to make one's views known to the government, but *Cantor* and *Trucking Unlimited* make clear that the right may not be used as a pretext to achieve otherwise unlawful results. "If the end result is unlawful, it matters not that the means used in violation may be lawful." *Trucking Unlimited,* 404 U.S. at 515. The *Noerr-Pennington* doctrine will not protect a utility which manipulates the federal and state regulatory processes to achieve anti-competitive results. It is not for expression of opinion that Kirkwood seeks

to compel UE to respond in damages, but rather for UE's conduct in the market place.

D. Other issues

Kirkwood argues on appeal that it raised several other antitrust issues in its complaint which the District Court should have considered before granting summary judgment. These include a Robinson-Patman Act claim (which, as noted above, the District Court dismissed prior to granting the defendant summary judgment) and claims of refusal to wheel and of territorial restriction.

With respect to the Robinson-Patman Act claim, the District Court held that Kirkwood did not sufficiently allege that the challenged sales took place in interstate commerce. Kirkwood asked for leave to amend its complaint to correct the supposed deficiency, but the District Court never ruled on the request, probably because its other holding — that electricity is not a "commodity" — was sufficient to support dismissal of the Robinson-Patman claim.

The District Court also premised its dismissal of Kirkwood's Robinson-Patman Act claim on the proposition that "electric power is probably not considered a commodity" for Robinson-Patman purposes. *City of Kirkwood* v. *Union Electric Co.*, No. 77-947C(2) (E.D. Mo. Jan. 23, 1978) (memorandum accompanying order granting motion to dismiss in part). We disagree. Though the Robinson-Patman Act does not cover sales of real property,[17] intangibles, or services,[18] electricity does not fall into any of these categories. Electric power can be felt, if not

---

[17] See *TV Signal Co.* v. *American Tel. & Tel. Co.*, 462 F.2d 1256, 1259 (8th Cir. 1972).

[18] See *Morning Pioneer, Inc.* v. *Bismarck Tribune Co.*, 493 F.2d 383, 389 n.11 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974).

touched. It is produced, sold, stored in small quantities, transmitted, and distributed in discrete quantities.[19] We hold that electricity is a commodity for purposes of the Robinson-Patman Act. The antitrust laws should not be given a restrictive interpretation.

Because we are reversing and remanding on the price-squeeze and Robinson-Patman issues, we express no view on Kirkwood's other antitrust claims, which the District Court's opinion did not mention. The District Court should address these claims on remand.

Finally, UE argues that even if a price-squeeze claim (or, presumably, any of Kirkwood's other claims) is cognizable in antitrust, summary judgment was correctly granted because Kirkwood has failed to show either competitive injury or recoverable damages. This argument is premature. The District Court did not reach it. This case has not yet been tried, and on the state of the preliminary record before us[20] the issues of presence or extent of competition and damages cannot be conclusively determined as a matter of law.

III.

Kirkwood's price-squeeze complaint is not precluded by the exclusive-jurisdiction, filed-rate, state-action, or *Noerr-Pennington* doctrines. We conclude that Kirkwood has stated a

---

[19] For a thorough analysis of the question, concluding that electric power does fall within the Robinson-Patman Act's coverage, see *City of Gainesville* v. *Fla. Power & Light Co.*, 488 F. Supp. 1258, 1279-83 (S.D. Fla. 1980). *Contra, City of Newark* v. *Delmarva Power & Light Co.*, 467 F. Supp. at 772-74.

[20] The record consists of discovery completed prior to the granting of summary judgment.

claim cognizable under the antitrust laws, though of course we express no views on the merits of that claim. The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 77-947 C (1)

City of Kirkwood,
Plaintiff,

vs.

Union Electric Company,
Defendant.

ORDER

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED that defendant's motion for summary judgment be and is GRANTED; and

IT IS FURTHER ORDERED that defendant shall have judgment against plaintiff on plaintiff's complaint.

Dated this 31st day of December, 1980.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 77-947 C (1)

City of Kirkwood,
Plaintiff,

vs.

Union Electric Company,
Defendant.

MEMORANDUM

This matter is before the Court upon defendant's motion for summary judgment. For the reasons stated below defendant's motion will be granted.

Plaintiff, City of Kirkwood, a municipal corporation, originally filed this cause on September 11, 1977 alleging that defendant, Union Electric Company, sold electricity to Kirkwood at a rate so high that Kirkwood could not compete for retail consumers of electricity. Plaintiff alleged that this conduct violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and § 2 of the Clayton Act as amended by the Robinson Patman Act, 15 U.S.C. § 13(a). The Court granted on June 23, 1978 defendant's motion to dismiss a subcount which alleged a violation of § 2 of the Clayton Act as amended by the Robinson Act, 15 U.S.C. § 13(a).

The following facts do not appear to be in dispute. The City of Kirkwood is a municipal corporation within the State of Missouri which, inter alia, operates its own electrical distribution system that provides electricity on a retail basis for approx-

imately two-thirds of the area of the city. Union Electric sells electricity at retail rate to the remaining approximate one-third of the City of Kirkwood. Union Electric has sold the City of Kirkwood electricity at wholesale prices, which the City of Kirkwood then distributes through its electrical distribution system. The regulation—the terms and the prices—of electricity provided by Union Electric are subject to regulation under The Federal Power Act, 16 U.S.C. § 824.[1]

The Federal Energy Regulatory Commission, which is limited to the regulation of the sale of electrical energy at wholesale prices in interstate commerce, prohibits discriminatory or preferential rates and also requires the setting of just and reasonable rates. 16 U.S.C. § 824d(a). Union Electric retails electricity throughout Missouri, and an area including the City of Kirkwood, subject to the regulation by the Missouri Public Service Commission, Chapters 389 and 393 RSMo 1969. The retail rates charged by Union Elecric are those allowed by order of the Missouri Public Service Commission, and such rates cannot be unreasonable, unjustly discriminatory or unduly preferential. Section 393.140 RSMo 1969.

Plaintiff alleges that:

> "[o]n September 13, 1975, defendant Company placed into effect against plaintiff a new 33.72 percent rate increase in the wholesale rate for electric power by means of a unilateral filing at the Federal Power Commission. At the same time, the defendant obtained no corresponding increase in its retail rates by appropriate action from the

---

[1] Prior to October 1, 1977, The Federal Power Act was administered by The Federal Power Commission, after which time the functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission. *See* The Department of Energy Organization Act, Pub.L. 95-91, 91 Stat. 565 (Aug. 4, 1977) and Executive Order 1009, 42 Fed. Reg. 46267 (Sept. 19, 1977).

> Missouri Public Service Commission. Subsequent to September 13, 1975, plaintiff paid approximately 35 percent more than Union was selling comparable power at retail to its large industrial primary service customers. The action by the defendant imposed a serious price squeeze upon the plaintiff."

In short, plaintiff alleges that defendant has engaged in a monopolization of interstate commerce of the distribution and sale of electric power at the retail level in violation of §§ 1 and 2 of the Sherman Act, by selling electricity to the City of Kirkwood at a rate greater than that sold by Union Electric to its large industrial customers.

Defendant moves for summary judgment pursuant to Rule 56 on this issue asserting three defenses: (1) that any remedy for damages resulting from a rate differential is not cognizable in an antitrust proceeding because such price differential is sanctioned by the Missouri Public Service Commission and the Federal Energy Regulatory Commission; (2) that the state action doctrine exempts these tariff rates from antitrust challenge; and (3) that the defendant is exempt from antitrust liability under the First Amendment and the Noerr-Pennington doctrine.

The gravamen of defendant's contention is that any damages allegedly suffered are not recoverable because the City of Kirkwood's action is really a dispute over the wholesale and retail rates charged by Union Electric for various customers, and the determinations of such are made by the Missouri Public Service Commission and/or Federal Energy Regulatory Commission. The City of Kirkwood as a potential customer had the right to intervene in both Federal Energy Regulatory Commission hearings, 18 C.F.R. § 1.8, as well as in the Missouri Public Service Commission retail hearings, § 393.260 RSMo 1979. The antitrust laws do not give a private cause of action for every alleged injury, but rather has dictated that in some instances the redress of wrongs shall be made by pursuing relief through ad-

ministrative proceedings of regulatory commissions. This Court is of the opinion that the City of Kirkwood's price squeeze contention is not a ground for recovery under antitrust laws. In *City of Newark* v. *DelMarva Power & Light Co.*, 467 F.Supp. 763, 769-70 (D.Del. 1979), a United States District Court held that:

> The Federal Power Act contemplates that the expert eye of the FPC will oversee the wholesale rates of public utilities in order to protect the public interest. That public interest involves not only the potential economic burden which the proposed rate will place on the public but also the potential of any rate to jeopardize the ability of a utility to continue its service. (footnote omitted).

Such rationale would appear to be equally applicable in the case at bar. The price squeeze alleged by plaintiff City of Kirkwood would not appear to be cognizable under the Sherman Antitrust Act. Because any alleged pecuniary loss results from the fine and collection of the rates authorized by the Missouri Public Service Commission or the Federal Energy Regulatory Commission, the City's exclusive remedy is with the public utility regulatory agencies. *See also City of Groton* v. *Connecticut Light and Power Co.* No. 15609 (D.Conn. August 27, 1980).

Both Union Electric's wholesale and retail rates are regulated by agencies of the federal and state governments, and therefore appear to be results of state action and so exempt from antitrust challenges. Union Electric's wholesale rates are set pursuant to the Federal Power Act, 16 U.S.C. §§ 824 et seq. Union Electric's Missouri retail rates are also regulated by a state actor—the Missouri Public Service Commission. Chapters 386 and 393 RSMo 1969. The Federal Power Act grants to the Federal Energy Regulatory Commission extensive control over all rates and charges made by a public utility in connection with the sale or transmission of electrical energy. The retail rates charged by Union Electric are also extensively regulated by the Missouri Public Service Commission. Such regulation consists

of, inter alia, the requirement that any time a utility files a new rule, regulation or practice relating to rates, there is to be a notice and a hearing concerning the propriety of such a rate. And, the Commission can and has suspended the operation and the deferment of such use for up to eleven months. The Public Service Commission sets the rate which Union Electric may charge for the sale of electricity on the retail level and Union Electric is bound by the rate which the Commission sets.

It has long been recognized that certain regulation is outside the reach of the antitrust laws under the "state action" exemption. *Parker* v. *Brown*, 317 U.S. 341 (1943). *Parker* v. *Brown* and subsequent cases dictate that there are two standards which must be met for antitrust immunity under *Parker* v. *Brown* to be satisfied. "First, the challenge restraint must be 'one clearly articulated and affirmatively expressed as a state policy'; second, the policy must be 'actively supervised by the state itself' ". *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Both requirements are met in the case at bar. First, the Missouri Public Service Commisison and the Federal Energy Regulatory Commission rate regulations are clearly articulated and are affirmatively expressed as state/federal policy. In addition, this policy is actively supervised by the federal and Missouri regulatory bodies. Therefore, when Union Electric has conformed with the comprehensive substantive and procedural regulation of the state and federal bodies, it would be inappropriate to expose it to antitrust liability for such compliance.

Lastly, Union Electric's activities in the filing of tariffs with the Federal Energy Regulatory Council and the Missouri Public Service Commission and the collection of utility rates under orders promulgated from these administrative bodies are immune from antitrust liability under the First Amendment to the United States Constitution and the Noerr-Pennington doctrine. Other than an instance where a "sham exemption" applied, the

Noerr-Pennington doctrine (*United Mineworkers* v. *Pennington*, 381 U.S. 657 (1965) and *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), would appear to allow Union Electric to petition the various administrative bodies for rate changes. The same exemption bars utility petitioning of regulatory bodies when such complaint is frivolous, one intended merely to insure that the utility assesses rates without the beneficial overview of public utility regulatory commissions. The complaint filed by the plaintiff in this cause does not allege any such sham or frivolous action on Union Electric's part which would constitute an exception to the Noerr-Pennington doctrine. Therefore, there being no genuine issues of material fact, defendants are entitled to summary judgment as a matter of law, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Dated this 31st day of December, 1980.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1521

September Term, 1981

City of Kirkwood, a Municipal Corporation,
Appellant,

vs.

Union Electric Company, a corporation,
Appellee.

JUDGMENT

This appeal from the United States District Court for the Eastern District of Missouri was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause is remanded to the said District Court for proceedings consistent with this Court's opinion.

March 4, 1982

Robert D. St.Vrain
Clerk, U.S. Court of Appeals, 8th Circuit.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1521

September Term, 1981

City of Kirkwood, a Municipal Corporation,
Appellant,

vs.

Union Electric Company, a Corporation,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

March 31, 1982

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action No. 77-0947-C(2)

City of Kirkwood, 139 South Kirkwood Road
Kirkwood, Missouri 63122,
A Municipal Corporation of the State of Missouri,
Plaintiff,

v.

Union Electric Company,
A Corporation, c/o Registered Agent Stewart W. Smith
1901 Gratiot, St. Louis, Missouri 63166,
Defendant.

COMPLAINT

The City of Kirkwood, Missouri, a municipal corporation of the State of Missouri, plaintiff, by its attorneys, brings this action against the Union Electric Company, defendant, named herein (sometimes referred to as "Union" or "Company") and alleges as follows:

I.

JURISDICTION AND VENUE

1. This civil action is initiated by the City of Kirkwood, Missouri, a municipality that operates its own electric distribution system, against the electric power company that controls its supply of wholesale electric power and competes with it for retail sales. The plaintiff requests relief from the defendant's past and continuing violations of Sections 1 and 2 of the Sher-

man Act (15 U.S.C. §§ 1 and 2) and Section 2 of the Clayton Act (15 U.S.C. §13(a)). The remedy plaintiff seeks is declaratory and injunctive relief as well as treble damages.

2. This Court has jurisdiction of this case by virtue of Sections 4 and 16 of the Act of Congress of October 15, 1914, as amended (15 U.S.C. §§15, 26) commonly known as the Clayton Act. The defendant Company transacts business within the Eastern District of Missouri and the violations of law herein described are being carried out within the Eastern District of Missouri where the defendant has its principal offices, transacts business and is found.

II.

PARTIES

3. The plaintiff is a public agency organized and existing under the laws of the State of Missouri. The plaintiff owns and operates its electrical distribution system and distributes power at retail. Presently, the plaintiff buys all of its electric power requirements from defendant.

4. The defendant Union is incorporated under the laws of the State of Missouri and is doing business in Missouri in the area where plaintiff municipality is located. The defendant is a vertically integrated power company which generates, transmits and distributes electric power at wholesale for resale and at retail. The Company provides electric utility services in Missouri, Illinois and Iowa and owns a controlling interest in Missouri Edison Company, Missouri Power & Light Company, Missouri Utilities Company and the Union Colliery Company and a forty percent interest in Electric Energy, Inc.

III.

TRADE AND COMMERCE

5. The electric power industry is comprised generally of three functional levels; production, transmission and distribution. Production encompasses the conversion into electric power of energy obtained from the combustion of fossil fuels, from moving water or from atomic reaction. Transmission refers to the moving of electric energy by a high-voltage line from points where the energy is generated to distribution centers. Distribution involves the delivery and sale of electricity to the ultimate consumers.

6. Union is the largest electric utility in Missouri, and one of the largest in the United States, serving generally an area including the City of St. Louis and many counties in eastern Missouri. The Company's supply of electricity comes in large measure from generation sources owned by Union and its subsidiaries, as well as from interconnected operations with other power companies in other states.

7. The defendant Company is engaged in the business of transmitting and selling electric power at wholesale, and presently is the plaintiff's only outside source of supply for wholesale electric power.

8. The defendant Company dominates and controls the distribution and sale of retail elecric power within its area of operations, which includes approximately one-third of the City of Kirkwood and completely surrounds the small distribution area of the plaintiff.

9. The Company dominates and controls the facilities for the transmission of electric energy within its area of operations which the plaintiff is completely dependent upon for its supply of bulk power.

10. Union has entered into power purchase agreements and is a participant in pooling and other interconnection arrangements with its subsidiary companies and with other utility systems in the Midwestern state area including Missouri, Illinois, Iowa, through which power is both transmitted and received across state lines.

IV.

VIOLATIONS OF LAW

11. The defendant has monopolized and has attempted to monopolize interstate trade and commerce in the distribution and sale of electric power at retail, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2), as follows:

A. On September 13, 1975, defendant Company placed into effect against plaintiff a new 33.72 percent rate increase in the wholesale rate for electric power by means of a unilateral filing at the Federal Power Commission. At the same time, the defendant obtained no corresponding increase in its retail rates by appropriate action before the Missouri Public Service Commission. Subsequent to September 13, 1975, plaintiff paid approximately 35 percent more than Union was selling comparable power at retail to its large industrial primary service customers. The action by the defendant imposed a serious price squeeze upon the plaintiff.

B. Defendant subsequently obtained increases in its retail rates before the Missouri Public Service Commission but the retail rates it put into effect were, on a comparable basis, below the wholesale rate put into effect on September 13, 1975, as well as the reduced wholesale rate (18.4% increase) put into effect on July 1, 1976, as a result of a settlement of Federal Power Commission proceedings. The defendant thus continues to impose a price squeeze upon the plaintiff.

C. The wholesale rate increase levied by defendant on plaintiff on September 13, 1975, was similar to the prior practice of the defendant in its previous wholesale rate filing whereby defendant set plaintiff's rates for wholesale power at a higher level and at an earlier time than the Company's rates charged to its retail customers and thereby imposed a price squeeze on plaintiff. The plaintiff has sought for many years by negotiations and proceedings before the Federal Power Commission unsuccessfully to have the discrimination eliminated. Any relief that the Federal Power Commission could grant will not provide an adequate remedy to plaintiff for the Company's anticompetitive activities in violation of the Federal antitrust laws.

D. The design of the wholesale rates put into effect by defendant precludes plaintiff from competing for classes of retail sales made by defendant.

E. The defendant Company's adoption of a wholesale rate to plaintiff which precludes the plaintiff from selling power to its customers at retail at the same rates charged by the Company at retail without impairing the traditional benefits derived by plaintiff from its municipality owned system has caused and threatens to cause the following consequences:

(1) The defendant Company has impaired the plaintiff's ability to compete against the defendant by depriving it of traditional benefits of municipal ownership;

(2) Defendant's action has caused the plaintiff to absorb the difference between the defendant's higher wholesale price and the defendant's lower retail prices, resulting in a loss of revenues and/or pressure on the citizens and officials of the municipality to discontinue operating the utility and to offer to sell or lease it to the defendant;

(3) Defendant's structure of its wholesale rate in relation to its retail rates precludes the plaintiff from competing for certain

classes of service such as industrial and electric heating, to the detriment of plaintiff.

F. The acts and practices of the defendant alleged herein have been done with the intent, and have had the effect of monopolizing the trade and commerce among the several states in the distribution and sale of electric power at retail and has injured the plaintiff municipality in its business and property. The plaintiff's losses are immediate, substantial and continuing.

12. Defendant has substantially lessened competition in violation of Section 2 of the Clayton Act (15 U.S.C. §13(a)) by doing, among other acts, the following:

A. Establishing its retail rates at such unreasonable and discriminatory levels in relationship to its comparable wholesale rates to municipalities that the plaintiff is unable to compete; and

B. See paragraph 11, *supra.*

V.

EFFECTS

13. The aforesaid violations have had among other things, the following effects:

A. Union has been able to impose unreasonable restraints on interstate trade and commerce in electric power in the service area of Union in Missouri;

B. Union has been able to preserve and expand a monopoly position in the interstate trade and commerce in electric power in the service area of Union in Missouri;

C. Union has been able to restrain competition in the retail, industrial and wholesale markets for electric energy in the service area of Union in Missouri;

D. Plaintiff is being denied benefit of lower cost power and an expanded revenue base which, but for the defendant's activities, would have been available to it;

E. Plaintiff is being denied revenues from the customers not served by reason of the acts of the defendant; and

F. Plaintiff has been and is being prevented from competing for and enjoying the benefits from obtaining a local electric power distribution system.

15. As the result of the above-described effect, the plaintiff has been damaged in an amount estimated at One Million Five Hundred Thousand Dollars ($1,500,000.00).

VI.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff prays as follows:

A. The Court adjudge and decree that the defendant has imposed unreasonable restraints on trade and attempted to monopolize and monopolized interstate commerce and elected power in the State of Missouri in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2).

B. That the Court adjudge and decree that the defendant through discriminatory pricing practices substantially lessened or destroyed competition for retail customers and between public and private distribution systems in the State of Missouri in violation of Section 2 of the Clayton Act (15 U.S.C. §13(a)).

C. That as prescribed by Section 4 of the Clayton Act (15 U.S.C. §15), the plaintiff recover three-fold the $1,500,000.00 damages sustained by it as a result of the defendant's violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and Section 2 of the Clayton Act (15 U.S.C. §13(a)) for a total of

Four Million Five Hundred Thousand Dollars ($4,500,000.00), plus attorneys' fees and costs.

D. That the defendant Union be permanently enjoined from engaging in, carrying out, or renewing any contracts, agreements, policies, practices, or understanding or claiming any rights thereunder having the purpose or effect of continuing, reviving or renewing the aforesaid violation of the Sherman and Clayton Acts or any contract, agreement, policy, practice, or understanding having like or similar purpose or effect, in accordance with the provisions of Sections 16 of the Clayton Act (15 U.S.C. §26).

F. That the plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
WHEATLEY & MILLER
1112 Watergate Office Building
2600 Virginia Avenue, N.W.
Washington, D. C. 20037
(202) 337-5543

EVANS HOEMEKE AND CASEY
By Robert B. Hoemeke
314 North Broadway, Suite 1400
St. Louis, Missouri 63102
(314) 231-2792
City Attorney - City of Kirkwood
Attorneys for Plaintiff.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Civil Action
No. 77-0947-C(2)

City of Kirkwood
A Municipal Corporation Of The
State Of Missouri,
Plaintiff,

v.

Union Electric Company,
A Corporation,
Defendant.

THE PLAINTIFF'S AMENDMENTS TO ITS COMPLAINT

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, the Plaintiff seeks to amend without leave of the court by amending paragraph 11c to add the following as 11c(1):

On September 27, 1977, Defendant filed a proposed new wholesale rate, designated as Electric Tariff W-3 which will institute a new 39.75 percent increase in the wholesale rate for electric power by means of a unilateral filing at the Federal Power Commission. The Company has not provided for corresponding increases in the retail rates to its retail customers. The action by the Defendant will impose a new serious price squeeze upon the Plaintiff. In addition, the Defendant's filing of September 27, 1977 completely redesigned its wholesale rates so that the Plaintiff would be subject to an increase substantially in excess of that which would be incurred by Defendant's other wholesale customers.

Amend Paragraph 11c to add the following as 11c(2):

Union has combined and conspired with its affiliates that sell wholesale electric power to adopt wholesale rates that preclude the Plaintiff from selling power to its customers at retail at the same rates charged by the Defendant. This combination and conspiracy precludes the Plaintiff from competing for classes of retail sales made by the Defendant on an equal basis.

Amend by changing Paragraph 11F to 11G and inserting a new Paragraph 11F as follows:

Union has combined and conspired with its affiliates that purchase wholesale electric power from the Defendant to sell wholesale power to these affiliates at rates lower than those charged the Plaintiff by the Defendant. Union's price discrimination between the Defendant's wholesale affiliates and Kirkwood is done to the detriment of Kirkwood.

Respectfully submitted,

/s/ Charles F. Wheatley, Jr.
Kenneth M. Barna
Wheatley & Miller
1112 Watergate Office Building
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 337-5561

/s/ Robert B. Hoemeke
City Attorney-City of Kirkwood
Evans, Hoemeke & Casey
Suite 1410
Boatmen's Bank Building
St. Louis, Missouri 63102
(314) 231-2792

Attorneys for Plaintiff

November 21, 1977

APPENDIX H

TEXT OF CONSTITUTIONAL PROVISION RELIED ON

United States Constitution, First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX I

TEXT OF STATUTES RELIED ON

Federal Power Act §205, 16 U.S.C., §824d: (As In Effect At Time Of Filing Of Complaint)[1]

"§824d. Rates and charges; schedules; suspension of new rates.

"(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

"(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations af-

---

[1]Amended November 9, 1978, Pub. L. 95-617, Title II, §§ 207(a), 208, 92 Stat. 3142; amendments not material to this action.

fecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the pro-

ceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

Federal Power Act §206(a); 16 U.S.C. 824e(a):

"§824e. Power of Commission to fix rates and charges; determination of cost of production or transmission.

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commision shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

Sherman Act §1, 15 U.S.C. §1:

§1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be beemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Act §2, 15 U.S.C. §2:

§2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Clayton Act §2(a), As Amended By Robinson-Patman Act, 15 U.S.C. §13(a):

§ 13. Discrimination in price, services, or facilities—Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions

and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Clayton Act §4, 15 U.S.C. §15 (As In Effect At Time Of Filing Of Complaint):

"§15. Suits by persons injured; amount of recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Clayton Act §11(a), As Amended, 15 U.S.C. §21(a):

§ 21. Enforcement provisions—Commissions and Boards authorized to enforce compliance

(a) Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communiciations Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking

associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

MISSOURI REVISED STATUTES

Secton 393.130. Safe and adequate service—charges

1. Every gas corporation, every electrical corporation, every water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation, water corporation or sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

2. No gas corporation, electrical corporation, water corporation or sewer corporation shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas, electricity, water, sewer or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

3. No gas corporation, electrical corporation, water corporation or sewer corporation shall make or grant any undue or unreasonable preference or advantage to any person, corpora-

tion or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

Section 393.140. General powers of commission in respect to gas, water, electricity and sewer services

The commission shall: (1) Have general supervision of all gas corporations, electrical corporations, water corporations and sewer corporations having authority under any special or general law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of furnishing or distributing water or gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, or for the purpose of collecting, carrying, treating, or disposing of sewage, and all gas plants, electric plants, water systems and sewer systems owned, leased or operated by any gas corporation, electrical corporation, water corporation, or sewer corporation.

(5) Examine all persons and corporations under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulations to be

done and observed; and whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaints, that the property, equipment or appliances of any such person or corporation are unsafe, insufficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.

(11) Have power to require every gas corporation, electrical corporation, water corporation, and sewer corporation to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such gas corporation, electrical corporation, water corporation, or sewer corporation; but this subdivision shall not apply to state, municipal or federal contracts. Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation, or sewer corporation in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates

and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations, to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time.

393.150. Commission may fix rates after hearing—stay increase—burden of proof

1. Whenever there shall be filed with the commission by any gas corporation, electrical corporation, water corporation or sewer corporation any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege or facility, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested gas corporation, electrical corporation, water corporation or sewer corporation, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the commission upon filing with such schedule, and delivering to the gas corporation, electrical corporation, water corporation or sewer corporation affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agree-

ment, rule, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective.

2. If any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation, electrical corporation, water corporation or sewer corporation, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

393.260. Complaints as to quality and price of gas, water, electricity and sewer service—investigation by commission—form of complaints

1. Upon the complaint in writing of the mayor or the president or chairman of the board of aldermen, or a majority of the council, commission or other legislative body of any city, town, village or county within which the alleged violation occurred, or by not less than twenty-five consumers or purchasers, or prospective consumers or purchasers of such gas, electricity, water or sewer, as to the illuminating power, purity, pressure or price of gas, the efficiency of the electric incandescent lamp supply, the voltage of the current supplied for light, heat or power, or price

of electricity sold and delivered in such municipality, or the purity, pressure or price of water or the adequacy, sanitation or price of sewer service, the commission shall investigate as to the cause of such complaint.

2. When such complaint is made, the commission may, by its agents, examiners and inspectors, inspect the works, system, plant, devices, appliances and methods used by such person or corporation in manufacturing, transmitting and supplying such gas, electricity or water or furnishing said sewer service, and may examine or cause to be examined the books and papers of such person or corporation pertaining to the manufacture, sale, transmitting and supplying of such gas, electricity or water or furnishing of such sewer service. . . .

393.270. Notice and hearing—order fixing price of gas, water, electricity or sewer service, or requiring improvement

1. Before proceeding under a complaint presented as provided in sections 393.110 to 393.285, the commission shall cause notice of such complaint, and the purpose thereof, to be served upon the person or corporation affected thereby. Such person or corporation shall have an opportunity to be heard in respect to the matters complained of at a time and place to be specified in such notice. An investigation may be instituted by the commission as to any matter of which complaint may be made as provided in sections 393.110 to 393.285, or to enable it to ascertain the facts requisite to the exercise of any power conferred upon it.

2. After a hearing and after such investigation as shall have been made by the commission or its officers, agents, examiners or inspectors, the commission, within lawful limits may, by order, fix the maximum price of gas, electricity, water or sewer service not exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished; and may order such improvement in the manufacture, distribution or

supply of gas, in the manufacture, transmission or supply of electricity, in the distribution or supply of electricity, in the distribution or supply of water, in the collection, carriage, treatment and disposal of sewage, or in the methods employed by such persons or corporation as will in its judgment be adequate, just and reasonable.

3. The price fixed by the commission under sections 393.110 to 393.285 shall be the maximum price to be charged by such corporation or person for gas, electricity or water for the service to be furnished within the territory and for a period to be fixed by the commission in the order, not exceeding three years, except in the case of a sliding scale, and thereafter until the commission shall, upon its own motion or upon the complaint of any corporation or person interested, fix a higher or lower maximum price of gas, electricity, water or sewer service to be thereafter charged.

4. In determining the price to be charged for gas, electricity, or water the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies. . . .

Office - Supreme Court, U.S.
FILED
JUL 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNION ELECTRIC COMPANY,

Petitioner,

v.

CITY OF KIRKWOOD, MISSOURI, A MUNICIPAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Charles F. Wheatley, Jr.
(Counsel of Record)
Don Charles Uthus
Peter A. Goldsmith
A. Hewitt Rose
WHEATLEY & WOLLESEN
Suite 1112
Watergate Office Building
2600 Virginia Avenue, NW
Washington, D.C. 20037-1971
(202) 337-5543

July 14, 1982

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Was it error for the United States Court of Appeals for the Eighth Circuit to decide that Union Electric Company's price squeeze conduct was not immunized from the antitrust laws by the First Amendment under the *Noerr-Pennington* doctrine, simply because the company's rate requests, which were silent as to price squeeze, were filed with federal and state regulatory agencies?

2. Did the United States Court of Appeals for the Eighth Circuit err in deciding that Union Electric Company's price squeeze conduct was not impliedly immunized from the antitrust laws by wholesale rate regulation under the Federal Power Act or exempted from the antitrust laws by Missouri's retail rate regulation, when neither the federal nor state commission compelled or authorized price squeeze conduct pursuant to a clear policy inconsistent with the antitrust laws?

3. Did the United States Court of Appeals for the Eighth Circuit err in deciding that electricity was a "commodity" for the purpose of applying the Robinson-Patman Act?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

I CORRECTLY CONSTRUED, THE DECISION OF THE COURT BELOW PROPERLY REJECTED THE APPLICABILITY OF THE *NOERR-PENNINGTON* ANTITRUST IMMUNITY 6

II UNION ELECTRIC'S PRICE SQUEEZE CONDUCT IS NOT EXEMPT FROM THE ANTITRUST LAWS MERELY BECAUSE OF RATE REGULATION 9

A. The Federal Power Act Does Not Exempt An Electric Utility's Price Squeeze From The Antitrust Laws 9

B. Missouri Retail Rate Regulation Does Not Exempt Union's Price Squeeze From The Antitrust Laws 14

III THE COURT BELOW CORRECTLY HELD THAT ELECTRICITY IS A COMMODITY UNDER SECTION 2(a) OF THE CLAYTON ACT AS AMENDED BY THE ROBINSON-PATMAN ACT 16

IV CONCLUSION 19

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES:

Ambook Enterprises v. Time, Inc., 612 F.2d 604 (2d Cir. 1979), *cert. denied*, 448 U.S. 914 (1980) 18

American Telephone & Telegraph Co. v. Delta Communications, Inc., 408 F. Supp. 1075 (S.D. Miss. 1976), *aff'd*, 549 F.2d 972 (5th Cir. 1978), *cert. denied*, 444 U.S. 926 (1979) 18

Aviation Specialists, Inc. v. United Technologies Corp. 568 F.2d 1186 (5th Cir. 1978) 18

Baum v. Investors Diversified Services, Inc., 409 F.2d 872 (7th Cir. 1969) 17, 18

Borough of Ellwood City v. Pennsylvania Power Co., 462 F. Supp. 1343 (W.D. Pa. 1979) 12

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 6, 8, 9

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 15, 16

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) 6, 7, 11, 14, 15

City of Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258 (S.D. Fla. 1980) 17, 18

City of Groton v. Connecticut Light & Power Co., 456 F.Supp. 360 (D. Conn. 1978) 11

City of Groton v. Connecticut Light & Power Co., 497 F. Supp. 1040 (D. Conn. 1980), *aff'd in part, rev'd in part*, 662 F.2d 921 (2d Cir. 1981) 11, 18

Cases (cont'd): **Page**

City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir. 1981) 10

City of Kirkwood v. Union Electric Co., 671 F.2d 1173 (8th Cir. 1982) ..... *passim*

City of Mishawaka v. American Electric Power Co., 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) 4, 8, 9

City of Mishawaka v. Indiana & Michigan Electric Co., 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978) 4, 10, 11, 12, 15

City of Newark v. Delmarva Power & Light Co., 467 F. Supp. 763 (D. Del. 1979) 17

City of Shakopee v. Northern States Power Co., Civ. No. 4-75-591 (D. Minn. October 10, 1976) 11

Columbia Broadcasting System v. Amana Refrigerator, Inc., 295 F.2d 375 (7th Cir. 1961), *cert. denied*, 369 U.S. 812 (1962) 16

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 6

Essential Communications Systems, Inc. v. American Telephone & Telegraph Co., 610 F.2d 1114 (3d Cir. 1979) 17

Export Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F.2d 251 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971) 16

Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976) 12, 15

Fleetway, Inc. v. Public Service Interstate Transportation Co., 72 F.2d 761 (3d Cir. 1934), *cert. denied*, 293 U.S. 626 (1935) 16

Cases (cont'd): **Page**

Gordon v. New York Stock Exchange,
422 U.S. 659 (1975) 12

Gulf State Utilities Co. v. FPC,
411 U.S. 747 (1953) 12

May Department Stores Co. v. Union Electric Co.,
107 S.W.2d 41 (Mo.S.Ct. 1937) 15

National Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City,
452 U.S. 378 (1981) 11

New Motor Vehicle Board v. Orrin W. Fox Co.,
439 U.S. 96 (1978) 14

Northern Natural Gas Co. v. FPC,
399 F.2d 953 (D.C. Cir. 1968) 12

Otter Tail Power Co. v. United States,
410 U.S. 366 (1973) 10, 11

Parker v. Brown,
317 U.S. 341 (1943) 14

Pennsylvania Water & Power Co. v. Consolidated Gas, 184 F.2d 552 (4th Cir. 1950), *cert. denied,* 340 U.S. 906 (1950) 17

Silver v. New York Exchange,
373 U.S. 341 (1963) 12

Sound, Inc. v. American Telephone & Telegraph Co., 631 F.2d 1324 (8th Cir. 1980) 13

Town of Norwood v. Boston Edison Co.,
No. 74-4104-T (D. Mass. May 7, 1982) 17, 18

United Mine Workers v. Pennington,
381 U.S. 657 (1965) 6

United States v. Aluminum Co. of America,
148 F.2d 416 (2d. Cir. 1945) 3

Cases (cont'd): **Page**

United States v. National Association of Security Dealers, 422 U.S. 694 (1975) 11

United States v. Radio Corp. of America, 358 U.S. 334 (1959) 12, 13

STATUTES:

Clayton Act, § 2(a) as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976) 3, 16, 17

Department of Energy Organization Act, Pub. L. No. 95-91, § 402(a), 91 Stat. 565 (1977) (codified at 42 U.S.C. § 7177(a) (1976) 2

Federal Power Act, 16 U.S.C. § 824 *et. seq.* (1976) 2, 11

McCarron-Ferguson Act of 1945, 15 U.S.C. §§ 1111, *et seq.* (1976) 14

Mo. Ann. Stat. § 3.93 (Vernon 1975) 2, 11, 15

Sherman Act, 15 U.S.C. §§ 1 & 2 (1976) 3

MISCELLANEOUS:

Price Squeeze – Substantive Rules, 44 Fed. Reg. 67, 158 (1979) 12

P. Areeda *Antitrust Law* ¶ 212.6 (1982 Supp.) 7

Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80 (1977) 7

Page

Note, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 Tex. L. Rev. 751 (1979) 11

Note, *The Applicability of Antitrust Laws to Price Squeezes in the Electric Utility Industry*, 54 St. Johns L. Rev. (1979) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2278

UNION ELECTRIC COMPANY,

Petitioner,

v.

CITY OF KIRKWOOD, MISSOURI, A MUNICIPAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The City of Kirkwood, Missouri (Kirkwood or City), plaintiff and respondent, owns and operates its electrical distribution system and sells electricity at retail to customers located in approximately two-thirds of the City's area. Kirkwood owns no generation facilities, but purchases all of its electricity at wholesale from Union Electric Company (Union or UE). Union, defendant and petitioner, is an investor-owned company, the largest electric utility in Missouri, and one of the largest electric utilities in the United States. It is vertically integrated into the generation, transmission, and distribution levels and controls the distribution and sale of retail electric power in southern Iowa, western Illinois and eastern Missouri in-

cluding the entire area surrounding Kirkwood and one-third of the area within the City.

Union's rates are regulated at the federal and state levels. Union's wholesale rates are regulated by the Federal Energy Regulatory Commission (FERC)[1] pursuant to the Federal Power Act, 16 U.S.C. §§ 824 *et. seq.* (1976). When a supplier desires an increase in wholesale rates, it must file a proposed rate increase before the FERC. After the sixty-day notice period has expired, the FERC can suspend collection of the rate from one day to a maximum of five months, but, at the end of the suspension period, the utility collects its proposed increase on an interim basis, subject to refund, until the FERC renders its final judgment establishing the just and reasonable rate. Union's retail rates are regulated by the Missouri Public Service Commission (MPSC) pursuant to Mo. Ann. Stat. ch. 393 (Vernon 1975). A proposed increase in retail rates cannot go into effect until after a final MPSC order establishing just and reasonable rates, but the MPSC must act no later than eleven months after the rate request has been filed.

Kirkwood's complaint, filed September 1, 1977 and amended on November 23, 1977, alleges that Union unilaterally filed a request for an increase in wholesale rates before the FERC and began collecting the 33.72 percent rate increase from Kirkwood as of September 13, 1975. Union filed no corresponding retail rate request before the MPSC. As a result, Kirkwood's wholesale rate

[1]As of October 1, 1977, most of the functions of the Federal Power Commission were transferred to the FERC. Department of Energy Organization Act, Pub. L. No. 95-91, § 402(a), 91 Stat. 565 (1977) (codified at 42 U.S.C. § 7172(a) (1976). For convenience, both federal commissions will be referred to as the FERC.

was approximately 35 percent higher than Union's comparable[2] retail rate collected from its large industrial primary service customers. The rate disparity was moderated somewhat but not eliminated by a subsequent retail rate increase and a lower wholesale rate resulting from a settlement.[3] On September 27, 1977, Union again filed for a wholesale rate increase of 39.75 percent with no corresponding retail rate increase. Kirkwood claims that by this "price squeeze"[4] conduct, Union has intentionally monopolized and attempted to monopolize interstate trade and commerce in the sale and distribution of electric power at retail in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2 (1976), and has substantially lessened competition in violation of Section 2(a) of the Clayton Act, 15 U.S.C. § 13(a) (1976), as amended by the Robinson-Patman Act.

On January 13, 1978, by an interlocutory order, the district court dismissed Kirkwood's Robinson-Patman Act claims on grounds electricity is not a "commodity" for the purpose of the Act and the complaint did not sufficiently allege sales occurring in interstate commerce. On July 24, 1980, Kirkwood sought reconsideration of the order and

---

[2]But for its identity as a retail-level competitor, Kirkwood would have qualified for this retail rate.

[3]The settlement explicitly preserved the issue of price squeeze for subsequent litigation.

[4]A price squeeze occurs when a vertically integrated company which has monopoly power at the wholesale level but faces competition at the retail level sets its wholesale rates so high that its wholesale customers will be unable to compete with it in the retail market. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 436-48 (2d Cir. 1945); *see generally,* Note, *The Applicability of Antitrust Laws to Price Squeezes in the Electric Utility Industry,* 54 St. John's L. Rev. 103, 104 (1979).

never ruled on the motions. Instead, on December 31, 1981, the district court disposed of the case by granting summary judgment for Union on grounds of three antitrust immunities: (1) federal implied immunity, (2) state action exemption, and (3) the *Noerr-Pennington* doctrine. The United States Court of Appeals for the Eighth Circuit reversed on both the Sherman Act and Robinson-Patman Act claims. The court remanded the case to permit Kirkwood to amend its complaint as to sales and to add other antitrust violations turned up in discovery. However, the court stayed its remand pending the outcome of Union's petition for certiorari. Kirkwood Appendix, A. [hereinafter cited as Kwd App.]

SUMMARY OF ARGUMENT

The court below fully considered and properly rejected Union's claims to a broad antitrust immunity. The decision is not contrary to the precedents of this Court, nor is there any significant conflict in the circuits. A previous case has considered the three specific antitrust immunities raised in Union's petition. In *City of Mishawaka v. Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977) (*Mishawaka I*), *cert. denied,* 430 U.S. 922 (1978) and *City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980) (*Mishawaka II*), *cert. denied,* 449 U.S. 1096 (1981), the United States Court of Appeals for the Seventh Circuit rejected antitrust immunity for an electric utility's price squeeze conduct. This Court properly denied review then and should do so now.

The court below fully considered and properly decided Union's price squeeze conduct was not immunized from the antitrust laws by the First Amendment under the *Noerr-Pennington* doctrine just because Union filed rate

requests before state and federal commissions. Contrary to Union's inaccurate construction of the decision below, the court correctly found Union had not satisfied the threshold requirement for the immunity: is the challenged conduct a genuine petitioning of the government for a redress of grievances? Union, in the present case, actually put the restrictive rates into effect against the City, placing it in a price squeeze. Union's rate requests are not speech advocating government approval of price squeeze conduct. There is no conflict in the circuits on this point.

The court below also properly rejected Union's claims to antitrust immunity for price squeeze conduct just because Union's wholesale and retail rates are regulated. Union's manipulation of the timing and level of its wholesale and retail rate filings was neither compelled nor authorized by the FERC or the MPSC. Furthermore, there is no "affirmatively expressed and clearly articulated" policy at either commission inconsistent with the antitrust laws. Indeed, their respective policies are complementary to the antitrust laws on this issue. Again, there is no conflict in the circuits.

Finally, Union offers no persuasive reason for altering this Court's policy of denying review to federal court construction of the word "commodities" for the Robinson-Patman Act, either in general or as applied to electricity. The alleged conflict in the circuits is overstated. The weight and trend of better-reasoned authority holds electricity to be a commodity.

I. CORRECTLY CONSTRUED, THE DECISION OF THE COURT BELOW PROPERLY REJECTED THE APPLICABILITY OF THE NOERR-PENNINGTON ANTITRUST IMMUNITY.

Union patently misconstrues the lower court's rationale for rejecting Union's claim to an antitrust immunity under the *Noerr-Pennington* doctrine[5] and seriously misstates this Court's holdings on the issue.[6] When the lower court's actual rationale is compared to this Court's actual holdings, it is plain the lower court fully considered and properly decided Union's price squeeze conduct was not immunized from the antitrust laws by the First Amendment merely because Union filed rate requests before state and federal commissions.

Union accused the court below of improperly applying *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) to conclude "that if the purpose or

---

[5]Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (Noerr); United Mine Workers v. Pennington, 381 U.S. 657 (1965) (Pennington).

[6]Union also misstates the nature of plaintiff Kirkwood's antitrust claims. Though the complaint, as amended, may not *yet* allege any anticompetitive conduct other than the "price-squeeze," the court below remanded the case to the district court with instructions to permit Kirkwood to amend its complaint to add claims as to other violations including price discrimination, territorial restrictions, a refusal to wheel and a refusal to deal. City of Kirkwood v. Union Electric Co., 671 F.2d 1173, 1176 n. 6 (8th Cir. 1982), Union Appendix, A-5 [hereinafter cited as Union App.]. Because that order has been stayed pending the outcome of Union's petition for certiorari, Kirkwood is unable to amend its complaint at this time. Furthermore, it is not true that Union's filings were made in good faith. While Kirkwood does not attack Union's retail and wholesale rate filings per se, Kirkwood does challenge Union's manipulation of the timing and level of the rates so as to create a price squeeze. This manipulation is not an act of "good faith."

end-result of the petition for governmental action is anti-competitive, the First Amendment protection from antitrust damages is lost." Union Petition at 5. The court made no such finding. Instead, the court found that Union had not satisfied the threshold requirement for a claim to a *Noerr-Pennington* antitrust immunity; is the challenged conduct a genuine petitioning of the government for a redress of grievances?

In *Cantor,* the mere filing of a tariff which included a free light bulb distribution program was found not to be a petitioning of the government for approval of the tie-in conduct such that an antitrust immunity was necessary. As the lower court pointed out, the Supreme Court held that:

> [N]othing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct.

428 U.S. at 601-2.[7] Similarly, the lower court found Union's rate requests not to be speech advocating govern-

[7]Union attempts to limit the force of this Court's holding by arguing the quoted passage came from a plurality opinion and was not the basis of the decision. However, the rationale of the point, that mere tariff approval by the state does not confer an antitrust immunity, was adopted in part III of the case which was joined by five members of the Court. Moreover, decisions on state action exemption are not unrelated to the *Noerr-Pennington* exemption. The state action exemption and the *Noerr-Pennington* exemption overlap but are not coincident. *See,* P. Areeda, *Antitrust Law* ¶ 212.6 (1982 Supp.). But in the context of a general regulatory antitrust exemption, as advocated by Union, the concepts may be the same. Certainly the dissent in *Cantor* thought so. 428 U.S. at 622-28. *See also,* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine,* 45 U. Chi. L. Rev. 80, 88-94 (1977) (Analysis of the impact of *Cantor* on *Noerr-Pennington* doctrine).

ment approval of price squeeze conduct. Union was free to ask either the federal or state commission for authorization for a price squeeze, but its rate filing does not constitute such a request, but was an actual restriction which had an immediate anticompetitive impact upon the City.

In *Trucking Unlimited,* the baseless litigation carried out against competing motor carriers so as to deny their entry into the market could not be considered a genuine petitioning for grievances. Similarly, Union's manipulation of the timing and level of its retail and wholesale rate requests seeks to *avoid* regulatory oversight of its price squeeze behavior instead of petitioning for governmental *approval* of the conduct. As the lower court said, "[i]t is not for expression of opinion that Kirkwood seeks to compel UE to respond in damages, but rather for UE's [price squeeze] conduct in the market place." Union App. at A-14-15.

There is no conflict in the circuits on this point. Union's citations at pages 8 and 9 of its petition do not address the issue of rate filings as speech advocating anticompetitive conduct. In *City of Mishawaka v. American Electric Power Co.,* 616 F.2d 976, 981-83 (7th Cir. 1980) (*Mishawaka II*), *cert. denied,* 449 U.S. 1096 (1981), the court held rate requests which had an anticompetitive effect were insufficient to immunize an electric utility's price squeeze conduct from the antitrust laws, and this Court properly denied certiorari.

Union seriously misstates the *Noerr-Pennington* doctrine when it argues that, because Kirkwood did not allege sham litigation in its complaint, Union is exempt from the antitrust laws. Union Petition at 6. Union's argument stands the concept of an affirmative defense on its head. It is Union that must demonstrate that Congress did not intend the antitrust laws to apply to its price squeeze conduct. Sham litigation is only one of several kinds of conduct to which the *Noerr-Pennington* immunity does not

apply. Because Union's rate requests of themselves are not anticompetitive conduct[8] and because Union's rate requests did not ask any regulatory authority to approve a price squeeze, it is Union who cannot establish the applicability of the *Noerr-Pennington* antitrust immunity.

The court below fully considered and correctly decided that the *Noerr-Pennington* immunity did not apply. Moreover, this case is identical to another case deciding the issue wherein this Court declined to review a finding that an electric utility's price squeeze conduct was not exempted by the First Amendment from the operation of the antitrust laws. *Mishawaka II.*

II. UNION ELECTRIC'S PRICE SQUEEZE CONDUCT IS NOT EXEMPT FROM THE ANTITRUST LAWS MERELY BECAUSE OF RATE REGULATION.

Union's only argument in behalf of certiorari on the issue of federal implied immunity and state action exemption is an alleged conflict between the decision of the court below and prior decisions of this Court. There is no such conflict. The court below fully considered Union's arguments and correctly decided that federal and state regulation does not immunize Union's price squeeze conduct from the antitrust laws.

A. The Federal Power Act Does Not Exempt An Electric Utility's Price Squeeze From The Antitrust Laws.

The Federal Power Act does not expressly immunize any conduct of electric utilities from the antitrust laws nor can a blanket immunity from antitrust laws be implied

[8] It is Union's manipulation of the *interaction* of the wholesale and retail rates that create the price squeeze.

from the statute's legislative history. *Otter Tail Power Co. v. United States,* 410 U.S. 366, 373-4 (1973) ("There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the antitrust laws"). Union claims to seek only a specific implied immunity for its challenged price squeeze conduct, but cites in support a case finding a blanket immunity implied from the Securities and Exchange Act for certain stock trading regulations of the New York Stock Exchange. Union further argues for immunity on the basis of the discredited "filed rate doctrine" without referring to it by name.[9] Both arguments are off point.

Because Union was neither compelled nor coerced by the FERC into creating a wholesale retail rate differential that created a price squeeze, and because there is no conflict between the Federal Power Act and the antitrust laws in their goals to curb such anticompetitive conduct, a specific implied immunity is unwarranted. Moreover, in a previous case where the issue of a specific implied immunity for an electric utility's price squeeze was laid before the Court, after request and receipt of the views of the Solicitor General on implied immunity, this Court declined to review a finding of no such immunity. *City of Mishawaka v. Indiana & Michigan Electric Co.,* 560 F.2d 1314 (7th Cir. 1977) (*Mishawaka I*), *cert. denied,* 430 U.S. 922 (1978).

---

[9]The "filed rate doctrine" as a form of back door antitrust immunity was rejected by the court below and was recently rejected by the United States Court of Appeals for the Second Circuit. *City of Groton v. Conn. Light & Power Co.,* 662 F.2d 921, 929 (2d Cir. 1981).

As this Court has recognized, one factor in determining whether the presumption against implied immunity has been overcome is whether the challenged conduct was within the defendant's control or coerced by the regulatory agency. *Otter Tail,* 410 U.S. at 374 (Interconnection and wheeling "relationships are governed in the first instance by business judgment and not regulatory coercion"); *see, Cantor v. Detroit Edison Co.,* 428 U.S. 579, 593-4 (1976); *see also,* Note, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine,* 57 Tex. L. Rev. 751, 787-8 (1979). Contrary to Union's assertions, the FERC neither ordered nor authorized Union's price squeeze. under Section 205(c) of the Federal Power Act, 16 U.S.C. § 824d (1976) and under Mo. Rev. Stat. § 3.93 150(1) (1978), Union alone controls both the timing and the level of its proposed wholesale and retail rates respectively. Union was always free to file wholesale rates before the FERC that would avoid the rate disparity. Thus, no antitrust immunity can be implied on this basis. *Mishawaka I,* 560 F.2d at 1220-21; *City of Groton v. Connecticut Light & Power Co.,* 456 F.Supp. 360, 367 (D. Conn. 1978) (*Groton I*); *City of Shakopee v. Northern States Power Co.,* Civ. No. 4-75-591, slip op. at 6 (D. Minn. October 10, 1976) (Kwd. App. B).

The other factor to be considered is whether the goals of the Federal Power Act and the antitrust laws are so clearly repugnant as to price squeeze that antitrust liability would interfere with the FERC's pursuit of that inconsistent goal. *National Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City,* 452 U.S. 378 (1981); *United States v. National Association of Security Dealers,* 422 U.S. 694, 719-20 (1975) (*NASD*) ("Implied antitrust immunity is not favored and can be justified only by a convincing showing of clear repugnancy between the an-

titrust laws and the regulatory system"); *Silver v. New York Stock Exchange,* 373 U.S. 341, 357 (1963) ("Repeal is to be regarded as implied only if necessary to make the [regulatory act] work, and even then only to the minimum extent necessary"). In *FPC v. Conway Corp.,* 426 U.S. 271 (1976), this Court held that the FERC has jurisdiction to consider and must consider price squeeze claims. Thus, the goals of antitrust law and the FERC regarding a price squeeze are not inconsistent. Contrary to Union's misreading of *Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975), mere agency authority to consider antitrust matters does not prove the agency has a goal inconsistent with the antitrust laws. *Gulf States Utilities Co. v. FPC,* 411 U.S. 747, 759 (1953) (Commission consideration of antitrust issues is an important "first line of defense against those competitive practices that might later be the subject of antitrust proceedings"); *see, United States v. Radio Corporation of America,* 358 U.S. 354 (1959).

In fact, FERC regulation is complementary to the antitrust laws, for, although the pro-competitive goals are the same, the remedies differ. *Mishawaka I,* 560 F.2d at 1318-9; *Borough of Ellwood City v. Pennsylvania Power Co.,* 462 F. Supp. 1343, 1343, 1349-50 (W.D. Pa. 1979); *see generally, Northern Natural Gas Co. v. FPC,* 399 F.2d 953, 959-61 (D.C. Cir. 1968). The FERC sees no conflict between antitrust enforcement of price squeeze claims and its own regulation of the issue. Price Squeeze – Substantive Rules, 44 Fed. Reg. 67,158, 67,160 (1979) (proposed rulemaking) ("The Commission does not have authority to grant damages to compensate wholesale customers for loss of business or other anticompetitive effects due to price discrimination; this relief must be sought in the courts") (footnote omitted). Moreover, the FERC has specifically disavowed a claim to exclusive jurisdiction

over price squeeze issues.[10] Brief for the United States and the Federal Energy Regulatory Commission as *Amici Curiae, American Electric Power Co., Inc. v. City of Mishawaka,* No. 2059 (U.S. December, 1980) at 10 (*Mishawaka II*); Brief for the United States as *Amicus Curiae, Indiana & Michigan Electric Co. v. City of Mishawaka,* No. 77-689 (U.S. April, 1978) at 10-11 (*Mishawaka I*)[11] (Kwd App. C & D).

In refusing to grant an implied immunity from the antitrust laws, the court below properly decided the law. Union was never compelled nor authorized by the FERC to impose a price squeeze on plaintiffs, and there is no conflict between the Federal Power Act and the antitrust laws with respect to price squeeze claims. Union cites no precedent supporting the specific implied immunity requested, while there is ample case support for no antitrust exemption of price squeeze conduct. This Court has denied review on this issue before and should deny review again.

---

[10]An agency's denial of exclusive jurisdiction over an antitrust issue is an important factor in determining whether implied immunity for the antitrust laws should be granted. Sound, Inc. v. Am. Tel. & Tel. Co., 631 F.2d 1324, 1331 (8th Cir. 1980) ("Unlike the SEC in the [*Gordon* and *NASD*] stock exchange cases, the FCC has strongly urged that its jurisdiction should not displace the antitrust law"); *see* United States v. Radio Corp. of Am., 358 U.S. 354, 365 n. 18 (1959).

[11]The General Counsel and the Solicitor of the FERC assisted the Solicitor General of the United States in the preparation of this brief. Thus, the brief expresses the views of the FERC.

B. Missouri Retail Rate Regulation Does Not Exempt Union's Price Squeeze From The Antitrust Laws.

There is no federal statute expressly authorizing a state to adopt a program compelling electric utilities to engage in price squeeze conduct,[12] nor is there any provision in the Missouri statutes expressly granting electric utilities the right to price squeeze retail-level competitors.[13] Union argues for an implied immunity on the grounds that its price squeeze conduct was the product of state compulsion and that the Missouri Public Service Commission (MPSC) had a clearly articulated, affirmatively expressed, and actively supervised policy on price squeeze conduct inconsistent with the antitrust laws. Union cannot establish either of these arguments.

Union argues that, because its retail rates are regulated, the MPSC controls its price squeeze conduct. But the MPSC never ordered Union to create a wholesale/retail rate disparity nor is that rate disparity the product of MPSC regulation. This is not a situation where "the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it . . . ." *Cantor v. Detroit Edison Co.,*

---

[12]*Compare,* McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1111, *et. seq.* (1977) (Business of insurance exempt to the extent it is established by state law).

[13]*Compare,* Parker v. Brown, 317 U.S. 341, 346 (1943) (California Agricultural Prorate Act authorizing restrictions on raisin production "so as to restrict competition among growers and maintain prices in the distribution of their commodities to packers."); New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96, 99-103 (1978) (California Automotive Franchise Act requiring a motor vehicle manufacturer to secure the approval of a state board before it could open a dealership within an existing franchisee's market area, if the existing franchisee objected).

428 U.S. 579, 594-5 (1976). It is Union that initiates when and at what level it will file its requested retail and wholesale rate increases. *Mishawaka I,* 560 F.2d at 1320.

Union further argues that Missouri's electric rate regulation is designed to displace *all* competition. But the mere existence of state rate regulation does not establish an intention by the state to authorize a private utility's particular anticompetitive behavior. In *Cantor,* a utility's program of distributing free light bulbs to its electricity customers was held not exempt even though the program was set forth in a tariff approved by a state agency and could not be abandoned without state agency approval. In establishing the MPSC, Missouri set forth no "clearly articulated and affirmatively expressed" policy inconsistent with the antitrust laws. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105 (1980). The vague dicta of *May Department Stores Co. v. Union Electric Co.,* 107 S.W.2d 41, 48 (Mo.S.Ct. 1937), cited by Union at page 13 of its petition, is hardly such a policy. If anything, Missouri's policy on price squeeze behavior is *consistent* with the antitrust laws. Rates which are "unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of law" are barred by Missouri law. Mo. Rev. Stat. § 393.140(5) (1978).

Certainly Union's price squeeze conduct is not "actively supervised" by the MPSC. *California Retail Liquor Dealers Association,* 445 U.S. at 105. As the court below correctly pointed out, "while UE's individual wholesale and retail rates are 'actively supervised' by the FERC and [M]PSC, Kirkwood challenges the interrelation of those rates, which is under the authority of neither Commission." 671 F.2d at 1180, Union App. A-13. Union's citation to *FPC v. Conway Corp.,* 426 U.S. 271

(1976) and discussion of the FERC's requirement to consider antitrust claims does not show the MPSC actively supervised a state regulatory policy inconsistent with the antitrust laws.

In refusing to grant an implied immunity from the antitrust laws on the basis of state action, the court below properly applied the standards of this Court expressed in *California Retail Liquor Dealers Association.* There is no clearly articulated and affirmatively expressed Missouri policy compelling or authorizing an electric utility's price squeeze behavior. Union cites no precedent supporting its claim to an immunity and points to no conflict in the circuits. This Court has previously denied review to a case finding no state action exemption for electric utility price squeeze conduct and should do so again.

III. THE COURT BELOW CORRECTLY HELD THAT ELECTRICITY IS A COMMODITY UNDER SECTION 2(a) OF THE CLAYTON ACT AS AMENDED BY THE ROBINSON-PATMAN ACT.

Union argues that whether electricity is a "commodity" for the purpose of the Robinson-Patman Act, 16 U.S.C. § 13(a) (1976), is an important federal question not settled by this Court. However, this Court has consistently declined to review lower court decisions interpreting the word "commodity" for a wide variety of items, preferring to let the lower courts evolve workable criteria for such a determination.[14] Moreover, as to Section 3 of the Clayton Act,

[14] *E.g.*, Export Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F.2d 251 (6th Cir. 1970)(exclusive right to sell liquor at lessor's tunnel between United States and Canada), *cert. denied,* 400 U.S. 1000 (1971); Columbia Broadcasting System v. Amana Refrigeration, Inc., 295 F.2d 375 (7th Cir. 1961) (sponsorship identification of television program), *cert. denied,* 369 U.S. 812 (1962); Fleetway, Inc. v. Pub. Serv. Interstate Transp. Co., 72 F.2d 761, 763 (3d Cir. 1934) (transportation by busses), *cert. denied,* 293 U.S. 626 (1935).

this Court has previously declined to review a case holding electricity is a commodity.[15] *Pennsylvania Water & Power Co. v. Consolidated Gas,* 184 F.2d 552, 559 (4th Cir. 1950), *cert. denied,* 340 U.S. 906 (1950). Union offers no persuasive reason for altering this policy, in general or as applied to electricity.

Union's purported conflict in the circuits is considerably overstated. *City of Newark v. Delmarva Power & Light Co.,* 467 F. Supp., 763 (D. Del. 1979) was decided by a district court which sought to immunize regulated utilities from the antitrust laws. 467 F. Supp. at 769-71. The district court's underlying philosophy was subsequently rejected in its own circuit. *Essential Communications Systems, Inc. v. American Telephone & Telegraph Co.,* 610 F.2d 1114 (3d Cir. 1979). Moreover, the two subsequent decisions on the issue severely criticize *City of Newark* and hold electricity is a commodity. *City of Gainesville v. Florida Power & Light Co.,* 488 F. Supp. 1258, 1279-1283 (S.D. Fla.

[15]When the Clayton Act was enacted in 1914, both § 2 (barring primary-line price discrimination) and § 3 (barring exclusive dealing arrangements) were limited to transactions involving "commodities," a term undefined by the Act. The Robinson-Patman Act of 1936 amended § 2 of the Clayton Act to add secondary-line price discrimination, but nothing in its legislative history evidenced a Congressional intent to redefine the word "commodities." Thus, decisions interpreting "commodities" for § 3 of the Clayton Act are applicable to § 2 of the Clayton Act, as amended by the Robinson-Patman Act. Baum v. Investors Diversified Services, Inc., 409 F.2d 872, 875 (7th Cir. 1969).

1980)[16]; *Town of Norwood v. Boston Edison Co.*, No. 74-4104-T (D. Mass. May 7, 1982) (order affirming Special Master's report of May 12, 1980) (Kwd App. E). Union also cites to *City of Groton v. Connecticut Light & Power Co.*, 497 F. Supp. 1040, 1052 n. 14 (D. Conn. 1980) (*Groton II*), *aff'd in part, rev'd in part,* 662 F.2d 921 (2d Cir. 1981) as support, but the court's comments were plainly *dicta* since plaintiffs in that case had already abandoned their Robinson-Patman Act claim. Finally, Union's other citations are to cases not dealing with electricity and establishing no principles contrary to *Gainesville and Norwood.*[17] Thus, the weight and trend of the better-reasoned authority holds electricity to be a commodity.

---

[16]At page 17 of its petition, Union criticizes *Gainesville's* analogy of electricity to other forms of energy found to be commodities. Union argues "that coal and gasoline are fuels which have 'grade and quality' which can be determined and compared, which is not true of electric energy." The Robinson-Patman Act is concerned with discrimination "in *price* between different purchases of commodities of *like* grade and quality . . . ." 15 U.S.C. § 13(a) (1976) (emphasis added). Since wholesale and retail electricity are commodities of *like* grade and quality, discrimination in price is unjustified. The definition of "commodities" in the Act does not depend on the capacity of the products to be subdivided by grade and quality.

[17]Am. Tel. & Tel. Co. v. Delta Communications, Inc., 408 F. Supp. 1075, 1114 (S.D. Miss. 1976) (network program and national advertising packages), *aff'd,* 549 F.2d 972 (5th Cir. 1978), *cert. denied,* 444 U.S. 926 (1979); Ambook Enterprises v. Time, Inc., 612 F.2d 604, 609 (2d Cir. 1979) (sale of newspaper ads), *cert. denied,* 448 U.S. 914 (1980); Aviation Specialists, Inc. v. United Technologies Corp., 568 F.2d 1186, 1191 (5th Cir. 1978) (repair contracts); Baum v. Investors Diversified Services, Inc., 409 F.2d 872, 875 (7th Cir. 1969) (shares in a mutual fund).

Union's remaining arguments that a commodity must be a good and that, somehow, there is a conflict between the Federal Power Act and the Robinson-Patman Act both have been crisply disposed of in *Gainesville*. Electricity is a good, and antitrust immunities are not lightly implied. Union's arguments do not come to grips with the most recent precedent.

The decision of the court below is not in conflict with any prior decisions of this Court, nor is there any basis to alter this Court's policy favoring development of criteria for defining a commodity for the Robinson-Patman Act by the lower federal courts, both in general and as applied specifically to electricity. The weight of authority favors finding electricity a commodity and should not be disturbed.

IV. CONCLUSION

The court below properly reversed the district court's grant of defendant Union's motion for summary judgment and remanded the case for trial. Union's claims to antitrust immunity were fully considered and properly decided. The decision is not in conflict with any of this Court's precedents nor is there any significant conflict in the circuits. As to the *Noerr-Pennington* immunity, the federal implied immunity, and the state action exemption, these issues have been previously raised before this Court and review denied. As to the electricity as a commodity issue, Union offers no persuasive reason why this Court should disturb the lower federal courts' proper development of the law. Therefore, Union's petition for certiorari should be denied.

Respectfully submitted,

Charles F. Wheatley, Jr.
(Counsel of Record)
Don Charles Uthus
Peter A. Goldsmith
A. Hewitt Rose
WHEATLEY & WOLLESEN
Suite 1112
Watergate Office Building
2600 Virginia Avenue, NW
Washington, D.C. 20037-1971
(202) 337-5543

July 14, 1982

INDEX TO THE APPENDIX

Page

ITEM:

A. *City of Kirkwood v. Union Electric Company*, No. 81-1521, Order Staying Mandate (April 14, 1982) 1a

B. *City of Shakopee v. Northern States Power Company*, Civ. No. 4-75-591 (D. Minn. October 18, 1976) 2a

C. Brief for the United States and the Federal Energy Regulatory Commission as *Amici Curiae, American Electric Power Company, Inc. v. City of Mishawaka*, No. 79-2059 (U.S. December, 1980) 12a

D. Brief for the United States as *Amicus Curiae, Indiana & Michigan Electric Company v. City of Mishawaka*, No. 77-689 (U.S. April, 1978) 27a

E. *Town of Norwood v. Boston Edison Company*, Civ. No. 74-4104-T, Memorandum (May 12, 1980); Order (May 7, 1982) 48a

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1521 September Term, 1981

City of Kirkwood, a Municipal Corporation, Appellant,	)	
vs.	)	Appeal from the United States District Court for the Eastern District of Missouri.
Union Electric Company, a Corporation, Appellee.	)	

On motion of appellee, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of sixty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

April 14, 1982

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CITY OF SHAKOPEE, MINNESOTA, a municipal corporation,	)	
Plaintiff,	)	Civ. No. 4-75-591
vs.	)	
NORTHERN STATES POWER COMPANY, a Minnesota corporation,	)	MEMORANDUM AND ORDER
Defendant.	)	

J. Leroy Thilly, BROADMAN, SUER, CURRY & FIELD, 131 West Wilson Street, Madison, Wisconsin 53703

Philip R. Krass, Assistant City Attorney, KRASS & MANAHAN, 1221 East Fourth Avenue, Shakopee, Minnesota 55379

Joe. A. Walters, James A. Rubenstein, O'CONNAR & HANNAN, 38th Floor, IDS Center, 80 South 8th Street, Minneapolis, MN 55402

I. INTRODUCTION

This matter is before this Court upon Defendant Northern States Power Co.'s (NSP) motion pursuant to Rule 12(b), Fed. R. Civ. P. to dismiss this antitrust action upon the ground that the Federal Power Commission (FPC) has ex-

clusive jurisdiction to hear the issues herein presented and to grant any relief which may be appropriate. For the reasons hereafter discussed, this Court has determined that this motion must be denied.

II. FACTS

The City of Shakopee (Shakopee) charges that NSP has used its monopoly position in the wholesale power market to monopolize, and attempt to monopolize, interstate trade and commerce in the distribution and sale of electrical power at retail to large industrial customers, in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. Specifically, Shakopee charges NSP with purposefully maintaining a "dual rate structure" for the wholesale and retail sale of electric power which makes it impossible for Shakopee to compete with NSP for large industrial customers in the Shakopee area.

NSP supplies electrical power to municipalities, like Shakopee, at a rate which is set by the FPC (wholesale rate). Shakopee, in turn, sells this power to its residents, including large industrial customers.

NSP also sells power directly to large industrial customers in a portion of Shakopee where the service zones of NSP and Shakopee overlap. The rate which these large industrial customers of NSP pay is set by the Minnesota Public Utilities Commission (PUC) (retail rate). This "retail" rate is lower than the "wholesale" rate Shakopee must pay to buy the same power directly from NSP. Therefore, without even considering Shakopee's added costs of transmission, it is impossible for Shakopee to sell power to these large industrial customers in the overlap zone, at a rate competitive with NSP's rate.

Shakopee claims that the effects of this dual rate structure includes, but is not limited to, a loss to it of the business of the large industrial customers in the overlap zone. Additionally, Shakopee charges that new industry will not locate in Shakopee if it must pay a higher power rate. Finally, existing industrial customers are pressuring Shakopee not to expand its service area and to get out of the power business altogether. Shakopee thus complains that it faces, alternatively, a loss of existing and new industry or limiting, or abandoning, its power business. The elimination of Shakopee from the power business would, of course, leave NSP as the only supplier in the Shakopee power market.

In arguing against antitrust liability, NSP points out that both the "wholesale" and "retail" power rates are set by governmental regulatory agencies, the FPC and PUC, respectively. Therefore, NSP argues, it is the responsibility of the PUC or FPC to remedy the anticompetitive effects, if any, of this dual rate structure. Furthermore, since Shakopee has chosen to limit its attack here to the conduct of NSP in applying for and winning approval of the wholesale rate, NSP argues that the FPC has exclusive jurisdiction over the anticompetitive conduct charged herein.

III. LAW

It is no longer open to question that dual rate structures in the sale and distribution of electrical power can be found to have an anticompetitive effect. *FPC v. Conway Corp.*, ____ U.S. ____, 96 S.Ct. 1999 (1976) (*Conway*). The question remaining is whether or not the FPC has the

exclusive jurisdiction to make that determination, to the exclusion of the antitrust laws. This Court has concluded that no such exclusive jurisdiction exists in the FPC because no antitrust immunity can be implied for the type of conduct complained of here.

In *Conway* the Supreme Court held that the FPC has a duty to consider allegations by a power company's wholesale customers (seven municipalities and two electrical cooperatives) that proposed wholesale rates, which are within the commission's jurisdiction, are discriminatory and noncompetitive when considered in relation to the power company's retail rates, which are not within the commission's jurisdiction.

There is nothing in the language of *Conway* which suggests that FPC jurisdiction is exclusive. Indeed, prior to *Conway* the FPC had refused to consider any anticompetitive effects in setting the wholesale rates.

The Supreme Court has, on many occasions, repeated the proposition that immunity from the antitrust laws "is not favored and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *Cantor v. Detroit Edison Co.*, ____ U.S. ____, 96 S.Ct. 3110, 3120 (1976) (*Cantor*); *United States v. National Association of Securities Dealers*, 422 U.S. 694, 720 (1975); *see also, United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963); *United States v. Borden Co.*, 308 U.S. 188, 197-206 (1939).

Most recently in *Cantor*, the Supreme Court stated that: "since our decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed. 2d. 359

[1973] [*Otter Tail*][1], there can be no doubt about the proposition that the federal antitrust laws are applicable to electrical utilities." ____ U.S. at ____, 96 S.Ct. at 3120[2].

---

[1]The Defendant in *Otter Tail* made an argument for antitrust immunity similar in many respects to NSP's argument, that since the FPC has the duty under the Federal Power Act to consider anticompetitive conduct in setting rates, its power to do so is exclusive Otter Tail Power Co. argued that since the FPC had the authority under the Federal Power Act to remedy the complained of violation by ordering an involuntary interconnection of power, that therefore, the jurisdiction of the FPC over the alleged anticompetitive conduct was exclusive. The Supreme Court, in rejecting this argument, stated as follows:

"There is nothing in the legislative history [of the Federal Power Act] which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible, consistent with the public interest." 410 U.S. at 373-374, 93 S.Ct. at 1028.

The cases cited by NSP are not [] apposite. *Montana-Dakota Utilities Co. v. Northwestern Public Services Co.*, 341 U.S. 246 (1951) was not an antitrust action and therefore is no authority for implying antitrust immunity. The Plaintiff power company merely wanted a refund from Defendant power company because it believed that it was charged an excessive rate.

Similarly, *McLean v. El Paso Natural Gas Co.*, 357 F. Supp. 329 (S.D. Tex. 1972) while claiming an antitrust violation, is an action attacking the rate itself, not a discriminatory application process. In any event, the continuing validity of this case is questionable in light of *Otter Tail* and *Cantor*.

City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) and *North Carolina v. FPC*, 393 F. Supp. 1116 (M.D. N.C. 1975) involve procedural avenues for attacking FPC orders, not anticompetitive conduct in the application process.

For a general discussion of antitrust immunity and its relationship to exclusive jurisdiction, see this Court's Opinion in *International Travel Arrangers v. Western Airlines*, 408 F. Supp. 431 (D. Minn. 1975).

[2]The Chief Justice expressly concurred in this portion of the Court's Opinion herein quoted or discussed ____ U.S. ____, 96 S.Ct. at 3123.

The Court went on to say that it "has consistently refused to find that regulations give rise to implied exemptions [from the antitrust laws] without first determining that exemption was *necessary* in order to make the regulatory act work, 'and even then only to the minimum extent necessary.'" ____ U.S. ____, 96 S.Ct. 3120 (footnote omitted) (emphasis supplied).

Finally, the Court made it clear that the same test of "necessity" is to be applied to exemption from the antitrust laws in the case of either federal or state regulation. ____ U.S. ____, 96 S.Ct. 3120 Text and n. 36.

Cantor and *Otter Tail* foreclosed any argument that the public utilities enjoy any general exemption from the antitrust laws as may exist in the securities field.[3] *See, United States v. National Association of Security Dealers, supra; Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975).

However, while no general exemption can be found, this Court must determine whether or not, based on the specific facts of this case, it is "necessary" to the functioning of the wholesale regulatory scheme for NSP to be immunized from antitrust liability. This Court concludes that no such necessity exists and that there is, in fact, little or [no] apparent conflict between applying the antitrust laws to the type of conduct complained of here and the smooth and efficient functioning of the FPC's regulatory scheme.

Cantor is authority for the proposition that anticompetitive conduct by a regulated power company in applying for a tariff rate, is subject to the antitrust laws.

---

[3] *Accord, California v. FPC,* 369 U.S. 482 (1962).

Cantor involved anticompetitive conduct in the promotion and proposing of retail power rates. The rate proposed by the defendant power company included as one of its costs, the furnishing to customers, free of additional charge, replacement electric light bulbs. The state regulatory agency approved this lightbulb exchange program as part of the tariff rate. Charged with an unlawful tie-in under the antitrust laws, the power company relied on the fact that once the state approved the lightbulb exchange program, as part of the tariff application, the company was bound by state law to continue to supply those lightbulbs at least until a new tariff was applied for and approved. Therefore, the company argued, it was immune from the operation of the antitrust laws under the state action doctrine of *Parker v. Brown,* 317 U.S. 341 (1943)[4]. The Supreme Court, after setting down the test of "necessity" applicable to both state and federal regulatory schemes[5], found that no such "necessity" for antitrust immunity was presented, because even though required by state law, the lightbulb program was "the product of a decision in which both the respondent [power company]

---

[4]The Supreme Court in *Cantor* likewise rejected an analogous attack based on *Eastern Ry. Presidents Conference v. Noerr Motor Freight* 365 U.S. 127 (1961). *See also, United Mine Workers v. Pennington,* 381 U.S. 657 (1965). ____ U.S. at ____, 96 S.Ct. at 3122. While the majority sought to distinguish *Noerr* on the grounds that it did not involve exemption for private action taken in compliance with the state law, this Court must agree with the logic of the dissenters in *Cantor* that the majority's decision substantially restricts the right of a public utility to engage in anticompetitive conduct in the petitioning process.____ U.S. at ____, 96 S.Ct. at 3134. After *Cantor* and *California Motor Transport Co. v. Trucking, Unlimited,* 404 U.S. 508 (1972), the so-called *Noerr-Pennington* doctrine must be viewed as severely limited.

[5]*See,* discussion *supra,* at pages 4 and 5.

and the Commission participated." ____ U.S. at ____, 96 S.Ct. at 3118. The Court went on to say:

> Respondent could not maintain the lamp exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have or not to have such a program is primarily respondents, not the Commission's. Id. (Footnote omitted)

The reasoning of the *Cantor* decision appears to be that if an anticompetitive practice is the product, at least in part, of the company being regulated, and could be avoided if the company chose to do so, then the anticompetitive condition is in reality the work of that company and is not "necessary" to the functioning of the regulatory scheme and will not be immunized from antitrust liability. As the Court in *Cantor* explained, approval of the proposed tariff did not increase the power company's risk of violating the law. ____ U.S. at ____, 96 S.Ct. at 3121. Similarly, the FPC approval of wholesale rates proposed by NSP has not increased NSP's risk of violating the antitrust laws.

It is sufficient to defeat this motion that the evidence may prove that NSP could easily have avoided the alleged monopoly position by tailoring its applications to allow for competitive "wholesale" and "retail" power rates. If this is not proved, then the conclusion would be that NSP has not *in fact* engaged in anticompetitive conduct in making its rate applications, not that such conduct is immune from antitrust liability.

No meaningful distinction can be made between the purposeful conduct charged here, which results in discriminatory and anticompetitive power rates, and similar conduct, as in *Cantor,* which results in an unlawful

tie-in. Neither situation is "necessary" to the functioning of the regulatory scheme[6].

Finally, it does not appear that it would be necessary for this Court to become involved in the process of setting rates in order to grant full and fair relief to Shakopee. In the event that Shakopee proves itself entitled to relief it would in no way disrupt the regulatory process for this Court to uphold an award of damages for past an-

---

[6]*Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945) relied on by both Shakopee and NSP, does not mandate a dismissal of the prayer for damages. In that case, Georgia was permitted to maintain an action to enjoin a conspiracy between common carriers to fix shipping rates in a manner which discriminated against Georgia products. In *United States v. Radio Corporation of America*, 358 U.S. 334 (1959) the Court had occasion to explain its decision in *Georgia*, not to permit a recovery of damages, as based on its unwillingness to interfere with rate structures and regulatory schemes which require expert skill to administer. However, the Court went on to say that where there is *"no pervasive regulatory scheme, and no rate structure to throw out of balance,* sporadic action by the Federal Courts can work no mischief." 358 U.S. at 350 (footnote omitted) (emphasis supplied).

Apart from the fact that in *Cantor* the Supreme Court has shown a willingness to interfere with rate structures which contain anticompetitive components, in the case at bar, there is no pervasive regulatory scheme or rate structure to throw out of balance. The discrimination alleged here is not between rates set by one regulatory agency, as was the case in *Georgia*, but rather is between the "wholesale" rate set by the FPC and the "retail" rate over which the FPC has no jurisdiction. Put simply, under these circumstances, antitrust immunity is not "necessary" to the functioning of the regulatory process because the discrimination is "external" to that process. The FPC does not control both ends of the discriminatory conduct.

Furthermore, the fact that the FPC can consider the anticompetitive effect of its wholesale rate does not displace the antitrust laws anymore than does similar power residing in the Interstate Commerce Commission. *United States v. Radio Corporation of America, supra*, 358 U.S. at 351-352.

ticompetitive conduct or to enjoin specified future anticompetitive conduct on the part of NSP in making and promoting its rate applications. In conclusion, this Court can find no reason for immunizing the conduct alleged herein from antitrust liability[7].

This Court finds NSP's remaining arguments for dismissal to be without merit. Therefore, for the reasons heretofore discussed, this motion to dismiss must be, and hereby is, denied.

IT IS SO ORDERED.

Dated: Oct. 18, 1976.

/s/

Miles W. Lord
United States District Judge

[7]In a recent letter to the Court, NSP's counsel argues that because Shakopee has now brought its anti-competitive allegations to the FPC in an Amended Petition to Intervene dated October 6, 1976, NSP's motion to dismiss is further strengthened. In light of the discussion in this Memorandum and Order, NSP's argument is not relevant to the legal issue before this Court. *See,* discussion *supra,* page 3.

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN ELECTRIC POWER CO., INC., ET AL.,
PETITIONERS

v.

CITY OF MISHAWAKA, INDIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

WADE H. MCCREE, JR.
Solicitor General

SANFORD M. LITVACK
Assistant Attorney General

BARRY GROSSMAN
BRUCE E. FEIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JEROME NELSON
Acting General Counsel

JOHN A. CAMERON, JR.
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2059

AMERICAN ELECTRIC POWER CO., INC., ET AL.,
PETITIONERS

v.

CITY OF MISHAWAKA, INDIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

QUESTIONS PRESENTED

1. Whether either the *Noerr-Pennington* doctrine or the Federal Power Act shields a utility from liability under Section 2 of the Sherman Act when its unilateral wholesale and retail rate-making actions, together with other conduct, reflect a specific intent to injure competition.

2. Whether the "state action" doctrine recognized in *Parker v. Brown*, 317 U.S. 341 (1943), and subsequent cases protects a monopolist from liability under Section 2 of the Sherman Act for manipulating federally-regulated wholesale

rates and state-regulated retail rates as part of a broader scheme to injure competition.

* * *

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner American Electric Power Co. (AEP) is an investor-owned public utility holding company. Petitioners American Electric Power Service Corporation and Indiana & Michigan Electric Company (I&M) are wholly owned subsidiaries of AEP (Pet. App. 107a). I&M is a public utility within the meaning of Section 201 of the Federal Power Act, ch. 687, 49 Stat. 847, 16 U.S.C. 824. It generates, transmits, and sells electric energy to both wholesale and retail customers in a service area that encompasses parts of Indiana and Michigan (*ibid.*). I&M's wholesale rates are subject to the jurisdiction of the Federal Energy Regulatory Commission (Federal Commission) pursuant to Part II of the Federal Power Act (16 U.S.C. 824-824h). Retail rates of I&M are regulated by state authorities in Indiana and Michigan.

Public utilities like petitioner I&M must file with the Federal Commission "schedules showing all [wholesale] rates and * * * all contracts which in any manner affect or relate to such rates" (16 U.S.C. 824d(c)). During the period pertinent to this litigation, I&M was required to provide 30 days' notice to the Federal Commission and the public prior to any modification of such rates or contracts (16 U.S.C. 824d(d)).[1] The Federal Commission may

[1]The 30-day period was extended to 60 days in 1978 by Pub. L. No. 95-617, Title II, Sections 207(a), 208, 92 Stat. 3142.

suspend any change in rate schedule and delay the use of a proposed rate for up to five months, and may hold a hearing "concerning the lawfulness of such rate[s]" (16 U.S.C. 824d(e)). If a hearing is not completed prior to the expiration of the five month suspension period, the proposed new schedule takes effect, but the Commission may require the utility to maintain an accurate account of amounts received by reason of the rate increase and to refund with interest any portion subsequently found "not justified" (*Ibid.*).

On its own motion or on complaint, the Commission may initiate a hearing to determine whether any previously established "rate * * * or contract" is "unjust, unreasonable, unduly discriminatory or preferential," and an affirmative finding invests the Commission with authority to establish a just and reasonable rate or contract to be thereafter observed (16 U.S.C. 824e(a)). Although the Commission may disapprove existing or suspended utility rates and prescribe future rates, it may not order reparations with respect to rates that were not suspended. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951).

Petitioner I&M must file its retail electric rates with the Public Service Commissions of Indiana and Michigan. Proposed retail rates must be approved by the respective commissions prior to being placed in effect. Ind. Code Ann. §§ 8-1-2-1, 8-1-2-38, 8-1-2-42 (Burns 1973); Mich. Stat. Ann. §§ 22.13(6), 22.13 (6a) (1970). I&M retains, however, unilateral authority to propose new rates. Ind. Code Ann. § 8-1-2-42 (Burns 1973); Mich. Stat. Ann. § 22.13(6a) (1970).

Respondents are ten municipalities that operate electric distribution systems, purchase all, or nearly all, of their

electric energy at wholesale from I&M, and retail that electricity in competition with I&M (Pet. App. 110a-117a).

2. Respondents filed an antitrust action against petitioners seeking injunctive relief and damages for an alleged attempt to monopolize and monopolization of the retail sale of electric power in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. The amended complaint alleged that I&M engaged in various types of anticompetitive conduct, including a predatory price squeeze effectuated by filing with the Federal Commission wholesale rates in June 1972 and May 1976. Those rates, which applied to respondents, exceeded I&M's retail rates for industrial customers located in or near respondent's service areas. The district court[2] and the court of appeals[3] refused either to dismiss the complaint for lack of jurisdiction or to stay proceedings pending the completion of inquiries by the Federal Commission into the lawfulness of I&M's 1972 and 1976 wholesale rates. This Court denied certiorari,[4] and, on remand, the case went to trial.

The district court found that respondents operate electric utilities within the service area of I&M, that each is wholly dependent on I&M for its bulk power, that I&M possesses a monopoly in the retail sale of electric power within its service area, and that I&M competes with respondents for the patronage of all consumers residing within respondents' corporate limits (Pet. App. 48a). I&M and respondents further compete for individual customers

---

[2]See Pet. App. 180a-199a.

[3]See *id.* at 157a-178a.

[4]436 U.S. 922 (1978). In a brief *amicus curiae*, the United States and the Federal Commission urged that certiorari should be denied.

actually located or contemplating location in each town or elsewhere in I&M's service area (*ibid.*). The district court also found (*id.* at 57a-77a) that petitioners had engaged in a series of anticompetitive and exclusionary actions with the specific intent and effect of preserving and augmenting I&M's monopoly power over retail sales of electricity. This course of conduct included (1) charging respondents unjust and unreasonable rates for wholesale electric power (rates subsequently disapproved by the Federal Commission), in excess of I&M's comparable retail rates and without cost justification; (2) disregarding obligations under the Federal Power Act to file wholesale rates only after considering their relationship with I&M's comparable retail rates and the possible anticompetitive effects caused by the wholesale-retail rate relation; and (3) repeatedly attempting to undermine respondents' source of power and competitive viability by threatening to terminate service and to impose short term, restrictive supply contracts. Accordingly, the district court concluded that petitioners had violated Section 2 of the Sherman Act through a combination of actions motivated by a specific intent to impair resondents' ability to compete, thereby maintaining or bolstering I&M's existing monopoly (Pet. App. 71a-77a). The district court rejected petitioners' contention that the *Noerr-Pennington* doctrine precluded reliance on the anticompetitive effects of I&M's wholesale and retail rate relationships to establish an antitrust violation (Pet. App. 77a-81a).

The district court awarded damages to respondents based on the difference between the unlawful wholesale rates charged by I&M and I&M's lower comparable retail rates (Pet. App. 86a-87a). In addition, the court directed petitioners in preparing and filing wholesale rates with the Federal Commission to take into account the relationship

between anticipated first year billings to respondents and the billings that would result if I&M's retail rates were charged. I&M also was enjoined from charging any wholesale rate that would produce expected billings in excess of amounts that would be collected if retail rates were charged, until the Federal Commission determined that the wholesale rate was just and reasonable (Pet. App. 91a).

By a unaminous vote, the court of appeals affirmed the district court's conclusion regarding petitioners' Sherman Act liability, but vacated and remanded on issues of relief. The court of appeals noted that its prior decision in this litigation[5] had established that I&M's anticompetitive actions were subject to the Sherman Act, and that the Federal Commission had neither exclusive nor primary jurisdiction over respondents' complaint (Pet. App. 8a). The court rejected the argument that the *Noerr-Pennington* and "state action" doctrines protected petitioners from antitrust liability resting in part on the intended anticompetitive relationship of I&M's wholesale and retail rates (*id.* at 13a-23a).

The court of appeals concluded, however, that the district court had incorrectly awarded antitrust overcharge damages based on the difference between I&M's unlawfully inflated wholesale rates and the retail rates I&M was then charging. It found no support for the district court's assumption of identity between a proper new wholesale rate and the existing retail rate. Instead, it held that the Federal Commission's refund order constituted the best

---

[5] *City of Mishawaka v. Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978).

measure of overcharge damages,[6] and that any other damages "should be based on proof of specific injuries suffered as a result of the utility's overcharges and other monopolistic practices" (Pet. App. 26a-30a). The court of appeals further held that respondents were entitled to damages for litigating costs incurred before the Federal Commission that were necessitated by I&M's threatened curtailment of their wholesale supply of electricity (Pet. App. 31a). The district court's injunction, which circumscribed petitioners' right to charge respondents wholesale rates in excess of comparable retail rates, was vacated and remanded for additional proceedings (*id.* at 35a-37a).

DISCUSSION

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or any other circuit. The decision applies settled principles of law to the facts of this particular case. Review by this Court is therefore unwarranted.

1. Petitioners' contention (Pet. 16-19) that the *Noerr-Pennington* doctrine forecloses antitrust scrutiny of their unilateral decisions respecting wholesale rates filed with the Federal Commission was correctly rejected by the lower courts. The *Noerr-Pennington* doctrine reflects a rule of statutory construction that declines to impute to

[6]While the present case was pending before the court of appeals, the Federal Commission was conducting proceedings to determine whether I&M's wholesale electricity rates for 1976-1978 were unjust or unreasonable. Following the court's decision, the Federal Commission determined that the rates were, in fact, unjust and unreasonable. See pages 9-10, *infra*.

Congress an intent to penalize bona fide attempts by private parties to influence public officials to make decisions that have the effect of restraining competition.[7] In such cases, of course, it is governmental action which is the proximate or direct cause of the competitive restraint. By contrast, the anticompetitive effect in this case occurred not as a result of governmental action, but from private rate filings that preceded any governmental action thereon. Indeed, it was the delay in governmental action that made it possible for I&M to injure respondents by its rate filings. It knew that its wholesale rate proposals would go into effect prior to a Federal Commission determination of their reasonableness, while its proposals for higher retail rates in all likelihood would not become effective until long after the new wholesale rates became effective. It was the anticipated postponement of regulatory action that enabled I&M to impose a price squeeze on respondents.[8]

---

[7]See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (collective activity designed to influence the passage or enforcement of laws); *United Mine Workers v. Pennington*, 381 U.S. 657, 669-672 (1965) (collective activity to influence the Secretary of Labor in setting minimum wages and to influence officers of the TVA in coal purchasing decisions); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (collective activity to influence the decisions of administrative or judicial bodies); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 379-380 (1973) (unilateral decision of utility monopolist to sponsor litigation).

[8]A monopolist violates Section 2 of the Sherman Act by engaging in a price squeeze if its wholesale rates unduly impede its wholesale customers from competing with it in the retail market, and if the monopolist sets its wholesale rates with the intent to achieve that effect. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 436-438 (2d Cir. 1945).

In short, I&M's rate filings were designed to forestall, rather than cause, governmental action. Under the controlling statute, the filed rates became effective unless and until the Federal Commission suspended them, and I&M obviously hoped that its filing and supporting data would simply be accepted by the Commission without any suspension and investigation. Thus, I&M's rates filings were made with the clear understanding that the rates contained therein would often become effective immediately and have the effect of damaging I&M's competitors for retail business. To that extent, they were private actions intended to have a direct effect without the intervention of a governmental body. In this context, it is clear that whatever First Amendment interest may be implicated ultimately by I&M's tariff filings, that interest does not shelter petitioners from antitrust liability based on their own immediately effective rate setting activities (see Pet. App. 16a).

Moreover, petitioners' *Noerr-Pennington* argument is flatly inconsistent with *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601-602 (1976), where this Court held that the mere fact that a regulatory body may approve a private tariff proposal does not make the proposing party's conduct immune from antitrust scrutiny under *Noerr-Pennington*. See also *California v. FPC*, 369 U.S. 482, 488-489 (1962); *United States v. R.C.A.*, 358 U.S. 334. 350-351 (1959) (private decisions to acquire assets remain subject to antitrust scrutiny even though the acquisition was contingent on regulatory approval). By focusing on the request for state approval, petitioners' *Noerr* argument would undercut this Court's repeated holding that state authorization of private restraints does not immunize the private conduct from the federal antitrust laws. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal*

Aluminum, Inc., 445 U.S. 97 (1980); *Cantor v. Detroit Edison, supra.*[9]

2. Petitioners also argue (Pet. 20-25) that the court of appeals improperly intruded on the ratemaking province of the Federal Commission by suggesting the possibility (Pet. App. 28a) that the district court might independently calculate antitrust damages ascribable to petitioners' unlawful wholesale-retail price squeeze. They assert that if the district court undertakes this task, its action would conflict with the Federal Commission's authority to determine just and reasonable wholesale rates. That argument, however, is plainly not ripe for review. While the court of appeals indicated that the district court could make its own overcharge assessment for the 1976-1978 period based on the Federal Commission's decision that the 1972-1976 rates were unreasonable, it clearly advised the district court to defer to the Federal Commission's then pending inquiry into the reasonableness of I&M's 1976 wholesale rates (Pet. App. 27a-28a). Subsequent to the decision of the court of appeals, the Federal Commission determined that I&M's rates were unjust, unreasonable, and unduly discriminatory.[10] The possibility that the district court will nevertheless endeavor to establish a just and reasonable wholesale rate for the 1976-1978 period in conflict with the Federal Commission's decision (despite the court of appeals' strong urging to the contrary) is wholly speculative and does not warrant review by this Court.

[9]We assume that the *Noerr-Pennington* doctrine would preclude the imposition of antitrust liability based solely upon the filing of tariffs intended in good faith to elicit governmental action. But the charging of rates under tariffs, as part of a broad scheme to monopolize by imposition of a price squeeze, is not immune from antitrust scrutiny. As *Cantor v. Detroit Edison, supra,* makes clear, *conduct* undertaken pursuant to a tariff is not necessarily shielded from antitrust liability simply because the conduct is described in a tariff.

[10]See Respondents' Br. in Opp. 15-16 n. 10.

Similarly speculative is any concern over possible injunctive relief. The court of appeals set aside the district court's injunctive order (Pet. App. 37a) and remanded with instructions to fashion a narrower decree that does not unduly infringe on the Federal Commission's rate making authority (*ibid).*

3. Petitioners renew the contention (Pet. 25-26) advanced in I&M's petition to this Court in No. 77-689, *cert. denied,* 436 U.S. 922 (1978), that the court of appeals erred in refusing to hold that the Federal Power Act repeals by implication Section 2 of the Sherman Act, as it applies to I&M's manipulation of its wholesale and retail rates with a specific intent to injure competition.[11] For the reasons set forth on pages 8-13 of the Brief for the United States as amicus curiae in No. 77-689, petitioners' contention is without merit.

4. Petitioners also maintain (Pet. 26-27) that the state action doctrine of *Parker v. Brown,* 317 U.S. 341 (1943), precludes Sherman Act liability for their intentional anticompetitive price-squeeze tactics because I&M's retail rates were approved by state authorities. The foundation of petitioners' price-squeeze liability, however, was not the level of I&M's retail rates *simpliciter;* rather, liability was predicated on the anticompetitive effects caused by the *relationship* between I&M's retail and wholesale rates, coupled with petitioners' disregard of the Federal Power Act's mandate not to engage in discriminatory pricing. *See FPC v. Conway,* 426 U.S. 271 (1976) (Pet. App. 18a-22a; 57a-58a). No state authority either ordered or possessed authority to order petitioners to align I&M's wholesale and

[11]Contrary to Petitioners' assertion (Pet. 25-26), the district court found, and the court of appeals agreed, that I&M's wholesale and retail rate alignments were motivated by a specific intent to injure competition (Pet. App. 20a-21a).

retail rates in a specified way, or to ignore the competitive implication of the relationship between wholesale and retail rates. As a result, the conflict between a clearly articulated state policy and federal antitrust policy which is a prerequisite for antitrust exemption under the state action doctrine is absent. See *Cantor v. Detroit Edison, supra,* 428 U.S. at 595-598; *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 410-413 (1978); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., supra,* 445 U.S. at 103-106.

5. A fair reading of the court of appeals' opinion refutes petitioners' attempt (Pet. 12) to characterize it as one of general applicability and importance to the electric utility industry. Neither lower court held that the filing of higher wholesale rates, while lower retail rates are likely to remain in effect, would by itself violate the Sherman Act. Rather, both courts indicated that a utility's failure to consider the competitive effects of the relationship between its wholesale and retail rates, or to justify that relationship on the basis of costs, constituted conduct which, together with other exclusionary practices, could be found to manifest a specific intent to monopolize (Pet. App. 21a, 77a). Here, the district court made findings that I&M possessed monopoly power, and engaged in a course of exclusionary conduct (of which the price squeeze was part) that manifested a specific intent to monopolize. The court of appeals affirmed those factual findings. There is no need for this Court to consider anew these factual issues. *Graver Mfg. Co. v. Linde Co.,* 336 U.S. 271, 275 (1949); see also *Berenyi v. Immigration Director,* 385 U.S. 630, 635 (1967).

Other courts surely will recognize that the court of appeals' decision rests on the facts of this particular case. Indeed, the very case which petitioners cite (Pet. Supp. Br.

1-4) to this Court as indicating a potential for conflict – *City of Groton v. Connecticut Light & Power Co.*, No. 15,609 (D. Conn. Aug 26, 1980) – distinguished this case as resting on its facts (Pet. Sup. Br. 20SA-21SA) and concluded that it did not present any conflict. There is no reason to presume that other courts will be less perceptive.[12]

---

[12]The district court in this case found, and the court of appeals agreed that respondents were compelled to incur litigating costs before the Federal Commission to combat threats that petitioners would curtail their supply of wholesale power (Pet. App. 323a, 59a). Those threats were elements of a course of conduct found to have violated the Sherman Act. The costs of litigating before the Federal Commission are injuries of the type the antitrust laws were intended to prevent, since the costs were necessary to preserve respondents' competitive viability. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). As the court of appeals explained, the litigating costs were forced upon respondents by petitioners' predatory tactics and were necessarily incurred in an attempt to save the source of their electric power: "the municipalities had no choice but to file an administrative action before the Commission to prevent the loss of their wholesale power source and to establish their right to equal treatment with the utility's retail customers whom the utility had indicated would receive preferences" (Pet. App. 32a). The court of appeals thus properly held that these litigating costs were recoverable antitrust damages, in reliance on prior decisions establishing that litigation costs forced upon parties as an integral part of an antitrust violation are recoverable (*id.* at 31a). Nothing in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), suggests that litigating costs may not be treated as recoverable antitrust damages when the necessary nexus between the costs and an antitrust violation is proven. That case dealt solely with the question whether a prevailing party could be awarded attorneys' fees incurred in bringing the litigation in question, absent specific statutory allowance. It did not consider the allowance of attorneys' fees incurred in a different litigation forced upon the victim of a predatory scheme.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SANFORD M. LITVACK
Assistant Attorney General

BARRY GROSSMAN
BRUCE E. FEIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JEROME NELSON
Acting General Counsel

JOHN A. CAMERON, JR.
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

DECEMBER 1980

In the Supreme Court of the United States

OCTOBER TERM, 1977

INDIANA & MICHIGAN ELECTRIC CO., PETITIONER

v.

CITY OF MISHAWAKA, INDIANA, ET AL.

000000

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD,
Assistant Attorney General

BARRY GROSSMAN
WILLIAM D. COSTON,
Attorneys
Department of Justice
Washington, D.C. 20530

ROBERT R. NORDHAUS,
General Counsel

HOWARD E. SHAPIRO,
Solicitor,

J. PAUL DOUGLAS,
Attorney,
Federal Energy Regulatory Commission
Washington, D.C. 20426

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC CO., PETITIONER

v.

CITY OF MISHAWAKA, INDIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order of Janaury 16, 1978, inviting the Solicitor General to express the views of the United States. The views expressed herein are those of the United States and the Federal Energy Regulatory Commission, an independent regulatory commission within the Department of Energy.

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether Part II of the Federal Power Act repeals by implication Section 2 of the Sherman Act as applied to the alleged anticompetitive manipulation by a public utility of wholesale and retail rates for electric energy.

2. Whether, in an antitrust suit raising such a claim of rate manipulation, when the suit is at the pre-discovery

stage and threshold antitrust questions are unresolved, the district court, under the primary jurisdiction doctrine, must defer proceeding with the case pending the completion by the Federal Energy Regulatory Commission of its administrative proceeding involving issues concerning the reasonableness of wholesale rates in their relationship to retail rates.

STATEMENT

1. Petitioner is a public utility within the meaning of Section 201 of the Federal Power Act, as added, 49 Stat. 847, 16 U.S.C. 824. Petitioner generates, transmits, and delivers electric energy to both wholesale and retail customers in a service area comprising southwest Michigan and northern Indiana (Pet. App. 33a). Petitioner's wholesale rates are subject to the jurisdiction of the Federal Energy Regulatory Commission ("Commission")[1] pursuant to Part II of the Federal Power Act (16 U.S.C. 824-824h). Petitoner's retail rates are sub-

[1]When this complaint was filed, the Federal Power Commission had jurisdiction over interstate wholesale electric rates under Sections 205 and 206 of the Federal Power Act, as added, 49 Stat. 851, 852, 16 U.S.C. 824d and 824e. As of October 1, 1977, pursuant to the Department of Energy Organization Act ("DOE Act"), Pub. L. 95-91, 91 Stat. 565, and Executive Order No. 12009, 42 Fed. Reg. 46267, the Federal Power Commission ceased to exist, and certain of its functions and regulatory responsibilities, including "the establishment, review, and enforcement of rates and charges for the transmission or sale of electric energy * * * under part, II of the Federal Power Act, and the interconnection, under section 202(b), of such Act, of facilities for the generation, transmission, and sale of electric energy (other than emergency interconnection[s]," were transferred to the Federal Energy Regulatory Commission (DOE Act, Section 402(a)(1)(B)), an independent regulatory Commission within the Department of Energy (DOE Act, Section 402(a)). Hereinafter, "Commission" will denote the former Federal Power Commission or the Federal Energy Regulatory Commission, as the context indicates.

ject to the regulatory authorities of the States of Indiana and Michigan.

Public utilities like petitioner are required to file with the Commission "schedules showing all [wholesale] rates and * * * all contracts which in any manner affect or relate to such rates" (16 U.S.C. 824d(c)). They must give the Commission and the public 30 days notice prior to making any change in such rates or contracts (16 U.S.C. 824d(d)). The Commission may suspend any new schedule and defer the use of the rate therein for not more than five months beyond the proposed effective date, and may hold a hearing "concerning the lawfulness of such rate[s]" (16 U.S.C. 824d(e)). If the hearing has not concluded at the end of the suspension period, the proposed schedule may go into effect, and the Commission may require the utility to keep account of the amounts received by reason of the increase and to refund with interest any "portion * * * found not justified" (16 U.S.C. 824d(e)).

The Commission "upon its own motion or upon complaint," may conduct a hearing to determine whether any "rate * * * is "unjust, unreasonable, unduly discriminatory or preferential," and, if it so finds, "the Commission shall [fix] the just and reasonable rate * * * or contract to be thereafter observed and in force * * * by order" (16 U.S.C. 824e(a)). Although the Commission may disapprove a utility's rates, whether suspended or not, and prescribe the rate to be collected thereafter, the Commission has no power to order reparations with respect to past rates that had not been suspended. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254.

Petitioner is required to file its retail rates with the Public Service Commissions of Indiana and Michigan. Both States require that the retail rates be approved prior

to being placed in effect. Ind. Code Ann. §§ 8-1-2-1, 8-1-2-38, 8-1-2-42 (1973); Mich. Stat. Ann. § 22. 13(6), 6(a) (1970). Petitioner may file new retail rates at will. Ind. Code Ann. § 8-1-2-42 (1973); Mich. Stat. Ann. § 22.13(6a) (1970).

The respondents are ten municipalities which operate their own electric distribution systems, purchase electric energy at wholesale from petitioner and retail that electricity to their own customers.

2. Respondents filed this antitrust action in March 1974 against petitioner, charging that it had monopolized and attempted to monopolize the distribution and sale of electric power at retail, in violation of Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 2 (Pet. App. 55a-64a). Specifically, the complaint and an amended complaint filed in 1976 alleged that petitioner, the area's sole wholesaler of electric power (*id.* at 58a, ¶ 5), and supplier of retail service to 90 percent of the communities in its service area (*id.* at 58a, ¶ 6), engaged in a predatory price squeeze by filing wholesale rates in June 1972 and May 1976 that were higher than the retail rates petitioner charged large industrial users located in or near respondents' service areas[2] *(id.* at 59a, ¶ 7(a)). This practice, it is alleged, threatened to squeeze respondents out of retail competition by preventing them from reselling electric energy to their industrial customers at rates competitive with petitioner's retail industrial rates (Pet. App. 58a-59a, ¶ 7). The complaint sought monetary damages and an injunction against the charging of wholesale rates that are higher than retail rates (*id.* at 61a, ¶¶ 3, 4).

---

[2]By order issued June 1, 1977, the Commission approved a settlement between petitioner and respondents with respect to petitioner's 1972 filing. However, there is some dispute whether that settlement has mooted the antitrust issues with respect to that filing (compare Pet. 7, n. 9, with Resp. Br. 5).

Prior to the filing of the complaint, the Commission, in January 1974, initiated hearings under 16 U.S.C. 824e(a) to determine the lawfulness of petitioner's 1972 wholesale rate filings and, in January 1977, initiated hearings to determine the lawfulness of the 1976 filing. Petitioner sought dismissal of the complaint for lack of jurisdiction or, alternatively, a stay of proceedings pending the conclusion of Commission proceedings on the 1972 wholesale rate filing. The district court declined to dismiss the case. It recognized that determination of the reasonableness of the wholesale and retail rates was the exclusive province of the Commission and the State Commissions, respectively (Pet. App. 45a). Nevertheless, it concluded that it had jurisdiction because the antitrust complaint challenged the relationship between, not the reasonableness of, the two categories of rates. It stated that neither regulatory agency had clear authority fully to dissipate the anticompetitive effects of the alleged price squeeze, and that there was no evidence of a congressional intent to exempt the alleged conduct from the antitrust laws (*id.* at 49a).

The court also declined to stay the antitrust litigation at the pre-discovery stage pending termination of the Commission's proceedings because the monopolization charge was based on the relationship between the two rates, not merely the rate over which the Commission had jurisdiction. The district court, however, held open the possibility of staying the antitrust case at the remedy stage and deferring to the Commission if a determination of the reasonableness of the whoelsale rate became relevant (*id.* at 53a).

3. On interlocutory appeal, the court of appeals affirmed (Pet. App. 6a-30a). It found nothing in the Federal Power Act or in any of this Court's opinions indicting that the Commission has exclusive jurisdiction over price

squeeze issues. It reasoned that although the Commission has statutory authority to adjust wholesale rates to lessen the anticompetitive effect of some price squeezes (*Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271), the Commission cannot remedy all such conduct (Pet. App. 15a-16a).

The court held that there was no reason to imply that the Commission had exclusive jurisdiction, *i.e.*, that the conduct upon which the complaint is based is exempt from the antitrust laws. The court concluded that as long as the rate structure — the relationship between the two rates — was not the result of governmental directive, but was initiated by the utility, there was no unfairness in applying the antitrust laws to the utility's conduct (Pet. App. 18a-19a). The court further ruled that the application of the antitrust laws to the particular practice charged here would not be repugnant to the regulatory scheme, because, if respondents demonstrated either attempted or actual monopolization, remedies under the antitrust laws would not disturb the regulatory rate-setting process (*id.* at 20a).

The court of appeals also concluded that approval of the retail rates by the state Commissions did not convert the utility-initiated dual-rate schedule into "state action" of the type to which the Sherman Act is inapplicable under *Parker v. Brown*, 317 U.S. 341. It is pointed out that while the federal courts may not review the reasonableness of the state-approved retail rates, neither the Michigan nor the Indiana Commission had approved the relationship between the wholesale and retail rates, which was the gravamen of the complaint (*id.* at 17a-18a). Consequently, it held that application of the antitrust laws to the utility-created relationship between the wholesale and retail rates would not create any federal-state conflicts.

The court of appeals also affirmed the district court's refusal to stay the antitrust proceedings. After reviewing the pertinent facts, the court concluded that neither the need to avoid conflicts between the court and the Commission nor the desirability of judicial access to Commision expertise gave the Commission "primary jurisdiction over the price squeeze" (*id.* at 21a) or warranted "deferral" to the agency "as a matter of judicial administration" (*id.* at 23a). The court saw no danger that the district court would make any determination of antitrust liability that would conflict with any Commission ruling on the reasonableness of the present wholesale rates (*id.* at 23a-27a). The court, however, noted the district court's obligation to stay its hand if the agency's expert views on those issues became relevant to any determination the district court would be required to make (*id.* at 30a).

DISCUSSION

1. Petitioner contends first (Pet. 10-20) that the Commission has exclusive jurisdiction to adjudicate (and remedy, if appropriate) the price squeeze allegations in the complaint because this Court, in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271, held that the Commission, in determining whether wholesale rates subject to its jurisdiction are just and reasonable, should consider whether the relationship between the utility's wholesale rates and its retail rates is discriminatory or anticompetitive. In other words, petitioner contends, in effect, that Part II of the Federal Power Act, giving the Commission jurisdiction over wholesale rates, implicitly repealed Section 2 of the Sherman Act as applied to alleged anticompetitive manipulations by electric utilities of their wholesale and retail rates. The court of appeals correctly rejected that contention.

This Court has often held that public utilities are not exempt from the antitrust laws merely because they are regulated by state or federal agencies (see *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579; *Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747; *Otter Tail Power Co.* v. *United States*, 410 U.S. 366), and Parts II and III of the Federal Power Act contain no express exemption of electric utilities from the antitrust laws. As this Court said in *Otter Tail Power Co., supra*, 410 U.S. at 373-374: "There is nothing in the legislative history [of Part II of the Federal Power Act] which reveals a purpose to insulate electric power companies from the antitrust laws. To the contrary, the history * * * indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest."

Whether a regulatory statute implicitly exempts *particular* challenged activities in a regulated industry from the antitrust laws depends on whether an exemption of those activities is essential to make the regulatory scheme work. *See, e.g., Gordon* v. *New York Stock Exchange*, 422 U.S. 659. Each case requires an analysis of the activity in question, the degree to which it is regulated, and the regulatory purpose, but the general principle is well settled that such repeals by implication are not favored. *Gordon, supra*, 422 U.S. at 682-683 and cases there cited.

In view of the nature of the alleged price squeeze and the Commission's limited remedial powers with respect to it, there is no basis for implying an exemption from the antitrust laws. A price squeeze operates like a vise, both jaws of which may be manipulated by the utility; one jaw is the retail rate and the other is the wholesale rate. The Commission can move only the wholesale rate, and it can do so only within a limited range, by adjusting the wholesale

rates within the zone of reasonableness. See *Conway, supra*, 426 U.S. at 278.

The Commission, however, may conclude that even after setting the wholesale rate at the lower end of the zone of reasonableness, the differential between that rate and the retail rate still works an anticompetitive price squeeze. Since the Commission cannot compel a utility to file higher retail rates with the state regulatory agencies, its jurisdiction to remedy the alleged antitrust violation is incomplete.[3] As in *Otter Tail Power C o., supra*, the limited authority of the Commission over the anticompetitive practice alleged shows that that practice is not immunized from antitrust regulation, and that the jurisdiction of the antitrust court is necessary to vindicate fully the policies of both the Federal Power Act and the antitrust laws "of maintaining competition to the maximum extent possible consistent with the public interest." *Otter Tail Power Co.*,

[3]Moreover, even the Commission's authority to adjust wholesale rates in response to its determination of an anticompetitive price squeeze is inadequate to compensate the victims for the antitrust violation. Save for post-suspension refunds of unjustified increases ordered in ongoing proceedings, it has no power to remedy past unreasonable rates: *i.e.*, it cannot award retroactive reparations. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co., supra*, 341 U.S. at 254. In addition, once the suspension period has expired, the utility's wholesale customers must pay the filed rate, which is the legal rate, until the Commission finds that rate to be unlawful. *Id.* at 251-252. If antitrust remedies were unavailable, wholesale customers would have no remedy for competitive injuries suffered in the interim. Postsuspension refunds, as the Court has observed, are an imperfect compensation for unreasonable rates. See, *e.g., Federal Power Commission v. Hunt*, 376 U.S. 515, 524-525; *Federal Power Commission v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 154. They are much more inadequate to compensate for the effects of an antitrust violation, for which Congress has authorized treble damages. See *e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 488-494; *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-265.

supra, 410 U.S. at 374.[4] See also *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 460-461; *Silver* v. *New York Stock Exchange*, 373 U.S. 341.

Application of the antitrust laws to price squeeze allegations would not interfere with the regulatory functions and responsibilities of the Commission with respect to wholesale rates. Since the antitrust court may refer to the Commission issues calling for the Commission's expertise under the doctrine of primary jurisdiction (discussed, *infra*, pp. 14-24), the functions of the court and the Commission will be complementary, not contradictory. That is, the court will be available to provide a complete remedy for anticompetitive or monopolistic practices that the Commission cannot fully remedy, without interfering with the agency's authority.

The cases relied on by petitioner are not to the contrary. Nothing in *Conway*, which held that the Commission had authority to consider in its proceedings the anticompetitive

---

[4]Indeed, the argument in favor of exclusive jurisdiction here is weaker than that held insufficient in *Otter Tail*. There Congress had authorized the Commission to order interconnections and had rejected a provision that would have required a utility to "wheel" energy over its lines and relied instead on voluntary utility action. The dissenters in *Otter Tail* indicated that, but for these congressional decisions, they too would have voted against exclusive agency jurisdiction. 410 U.S. at 390-391, n. 7 (Stewart, J., dissenting). Here, there is no such evidence that Congress arguably intended to insulate a utility's structuring of the relationship between its wholesale and retail rates from antitrust scrutiny. Rather, the limitations which Congress placed on the Commission's rate setting authority suggest that the Congress intended the antitrust laws to complement the authorities of the Commission and the respective state commissions, and to regulate the conduct that neither the Commission nor the state commissions may regulate.

effects of an alleged price squeeze between retail and wholesale rates, suggested that the Commission was the exclusive forum for adjudicating those issues and, consequently, that an injured party has no judicial remedy under the antitrust laws.

Gordon v. *New York Stock Exchange, supra,* and *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694, involved completely different statutory schemes. In those cases this Court implied an antitrust exemption because it found an irreconcilable conflict between the standards of the Sherman Act on the one hand and the Securities Exchange Act and the Investment Company Act on the other. The regulatory statutes contemplated and authorized, subject to Securities and Exchange Commission's revision and approval, the practices that were challenged (commission rate fixing and mutual fund distribution restrictions) and that would otherwise have been *per se* violations of the Sherman Act.

In contrast, Part II of the Federal Power Act gives no indication that Congress intended either to approve the challenged price squeezes or to subject those practices to the exclusive regulatory jurisdiction of the Commission. As this Court has observed of the Federal Power Act (*Otter Tail, supra,* 410 U.S. at 374):

> Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies emphasized in the antitrust laws.

2. Petitioner also contends (Pet. 24-28) that even if the Commission has completed its administrative proceeding issues the complaint raises, principles of primary jurisdiction require that the district court stay its hand until the Commission has complete its administrative proceeding on the lawfulness of petitioner's 1976 wholesale rates (see *supra*, p. 5). The court of appeals correctly rejected that contention.[5]

The doctrine of primary jurisdiction "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 63. In cases where a court has jurisdiction over a claim, it may nevertheless be appropriate for the court to refer specific issues to the agency in order to ensure "consistency in the regulation of business entrusted to a particular agency" and also to enlist the expert assistance of "agencies that

---

[5]Petitioner also criticizes at some length (Pet. 20-23) the court of appeals' reliance on *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, apparently in support of petitioner's contention that the states' regulation of its retail rates provides antitrust immunity under *Parker* v. *Brown*, 317 U.S. 341. However, petitioner has not presented that issue for review (see Pet. 2-3). In any event, *Cantor* itself refutes any broad contention that a state agency's mere approval of rate filings immunizes the utility from antitrust liability with respect to all actions relating to that filing (see 428 U.S. at 595-598), particularly where, as here, the complaint does not concern the retail rate *per se*, but the relationship between that rate and the wholesale rate. See *City of Lafayette* v. *Louisiana Power and Light Co.*, No. 76-864, decided March 29, 1978.

We do not suggest that petitioner is completely foreclosed from raising a "state action" defense. For example, if the alleged price squeeze resulted solely from a state agency's reduction of the utility's proposed retail rates, the squeeze might be attributable to state rather than private action. Such a defense would be an evidentiary one, however, and, as petitioner recognizes (Pet. 23, n. 14), the factual allegations in the complaint must be accepted as true for purposes of the motion to dismiss.

are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Far East Conference* v. *United States*, 342 U.S. 570, 574-575. See also *Nader* v. *Allegheny Airlines*, 426 U.S. 290, 303-304. In the present case, the Commission already is conducting a proceeding to determine the lawfulness under the Federal Power Act of the price squeeze allegedly resulting from the 1976 wholesale rate. Accordingly, there would be no need for the antitrust court to refer this case to the agency to make that determination. The question, rather, is whether the district court should defer proceeding with the antitrust case to enable the Commission to exercise its primary jurisdiction over certain issues. Since we believe that the issue of referral, as it usually arises under the primary jurisdiction doctrine, and the issue of deferral under that doctrine here presented, involve primarily the same considerations, we shall discuss the question here under the traditional primary jurisdiction analysis.

Both the district court and the court of appeals recognized that at some point in this litigation it may become appropriate for the district court to defer its proceedings to enable the Commission to consider certain issues that call for the application of the agency's expertise. That possibility, however, does not mean that deferral is necessary at the present, pre-discovery stage of the litigation.

Respondents' complaint raises several factual issues that do not call for the application of the Commission's expertise and that should be considered in the first instance by the district court. These include the following: has petitioner departed from the historical relationship between its retail industrial rates and its wholesale rates in recent filing: has petitioner engaged in conduct in Fort Wayne designed to discourage continuation of the Fort Wayne municipal system (Pet. App. 59a, ¶ 7(b)); are petitioner's

present retail rates to large industrial users in fact lower than present wholesale rates;[6] were petitioner's past retail rates in fact lower than past wholesale rates; have any antitrust issues relating to the 1972 wholesale filing been settled;[7] and does the alleged price squeeze result from state commission reductions in the retail rate tariffs petitioner proposed?[8]

Initial judicial resolution of these threshold issues would establish the contours of the antitrust case. Moreover, such resolution might result in dismissal of the suit for failure to establish a *prima facie* case. Deferral is not appropriate until resolution of a material issue requires Commission expertise or the application of regulatory standards that call for uniform application. Whether such requirements exist cannot be determined in the abstract, or at the present preliminary stage of this litigation *Cf. American Tel. and Tel. Corp. v. United States, C.A.D.C.*, No. 77-2009, decided May 26, 1977, *certiorari denied* November 28, 1977, No. 77-372. Deferral to the Commission's primary jurisdiction at this point would be premature. Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp., 360 U.S. 411, 415.

Indeed, the court of appeals' statement that the district court may at some point refer to the Commission "to decide * * * antitrust damages, or for other purposes" (Pet. App. 30a), indicates sensitivity of the court below to the proper balance between electric utility regulation and antitrust law enforcement. *Otter Tail, supra,* 410 U.S. at 382.

---

[6]Petitioner contends that its wholesale rates are actually lower than applicable retail rates and that consequently respondents' claim of injury is without merit (Pet. App. 37a).

[7]There is some dispute whether all such issues were settled. Compare Resp. Br. at 5 with Pet. Br. at 7 n. 9.

[8]Petitioner states that the Indiana Commission reduced its 1976 Indiana rate filing by some $34 million (Pet. 23, n. 14).

3. Although the Commission and the United States agree that it would be premature for the antitrust court now to stay this case pending the Commission's decision and that the petition for a writ of certiorari should therefore be denied, the Commission and the United States have different views with respect to the necessity of an eventual exercise of the agency's primary jurisdiction over certain issues and the consequences of the Commission's decision thereunder.

a. In the Commission's view the issues the complaint raises and the Commission's regulatory responsibilities over rates, as construed by this Court in *Conway* and other cases, indicate that at some point in this litigation the Commission's action taken in the exercise of its primary jurisdiction may become controlling. The gravamen of the complaint is the allegation that petitioner has structured its wholesale and retail rates in a way to eliminate its retail competitors (and wholesale customers) for monopolistic purposes. *Conway* establishes that the Commission must consider such an allegation in reviewing the justness and reasonableness of the wholesale rates. If, in its pending proceeding, the Commission were to conclude under *Conway* that the differential between the wholesale and retail rates is justifiable and not the product of anticompetitive manipulation, and therefore approved the wholesale rate as just and reasonable, established ratemaking principles indicate to the Commission that a court would be bound by such a determination.

The Commission believes that such a conclusion is required because decisions of this Court indicate that only the agency charged by Statute with ratemaking responsibilities has jurisdiction to determine whether rates are just and reasonable; any other conclusion would present a risk of conflicting determinations and standards concerning the reasonableness (and therefore the lawfulness) of rates that is inconsistent with basic principles of rate regulation. *United States* v. *Radio Corporation of*

America, 358 U.S. 334, 346-348; *Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; *cf. Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 453.

In the Commission's view, this Court's decision in *Conway* establishes that one of the criteria for determining the reasonableness of jurisdictional wholesale rates is the effect on competition of the relationship of that rate to the non-jurisdictional retail rate. Since the Commission's assessment of that effect is integral to its determination of the reasonableness of the wholesale rate (and *vice versa*), that assessment must, in the agency's view, be binding on the antitrust court. In sum, before the respondents can prevail on their antitrust complaint, the Commission must determine the ultimate issue of the reasonableness of the wholesale rates in relation to the retail rates.

The Commission believes that such a determination would not only prevent inconsistent decisions respecting the reasonableness of rates but also would serve the other policy of the primary jurisdiction doctrine by enlisting the expertise of the administrative agency on technical issues within its province.[9] See *United States* v. *Radio Corpora-*

[9]The Commission has promulgated procedures for the exploration of price squeeze issues. FPC Order No. 563, Docket No. RM76-29, issued March 21, 1977. They require the party alleging an anticompetitive price squeeze to set forth, at least, the following elements (18 C.F.R. 2.17):

1) Specification of the filing utility's retail rate schedules with which the intervening wholesale customer is unable to compete due to purchased power costs;
2) A showing that a competitive situation exists in that the wholesale customer competes in the same market as the filing utility;
3) A showing that the retail rates are lower than the proposed wholesale rates for comparable service;
4) The wholesale customer's prospective rate for comparable retail service, i.e., the rate necessary to recover bulk power costs (at the proposed wholesale rate) and distribution costs; [and]
5) An indication of the reduction in the wholesale rate necessary to eliminate the price squeeze alleged.

tion of America, supra, 358 U.S. at 346. The issues which the Commission would consider, as this Court indicated in *Conway, supra,* 426 U.S. at 280-282, include determinations as to "which of the [utility's] costs are allocable to its non-jurisdictional, retail sales and which to its jurisdictional, wholesale sales" (*id.* at 280-282). It must also consider "not only * * * the existence of a difference between jurisdictional and non-jurisdictional rates, but also * * * the anticompetitive impact of the particular magnitude of [the] rate differential." *Cities of Batavia* v. *Federal Power Commission,* 548 F. 2d 1056, 1057 (C.A.D.C. 1977). These questions involve expert exploration of the reasons for the differential, including the competing systems' operating costs and the engineering and generating factors bearing on those costs (*id.* at 1057-1058).[10]

In Order No. 563, *supra,* the Commission also expressly recognized "that state commission participation in rate proceedings before the Commission, particularly in cases involving retail and wholesale rate comparisons, would be desirable, and awareness of the state commission's views on price squeeze issues would be valuable" (*id.* at 5-6). Accordingly, state commissions are automatically included in the service list in *Conway* cases. 18 C.F.R. 2.17(f). The participation of the state commissions may enable the Commission to develop a more complete record. See 16 U.S.C. 824c(b), and 824h(b); 18 C.F.R. 1.37 (Cooperative procedure with state commissions).

[10]The same considerations make it appropriate for the antitrust court to refer to the Commission issues involving the reasonableness of past rates. Although the Commission has no authority to provide retroactive remedies (see *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra*), the need for uniformity in the standards governing just and reasonable rates and the assistance which the Commission's expertise can bring to bear on the technical issues involved suggest that those issues should also be referred to the Commission for its determination. *Montana-Dakota Utilities Co.* is not to the contrary. There the Court held there was no federal cause of action with respect to the plaintiff's claim that past rates were the result of the defendant's fraud, and there was therefore no basis for referring the case to the Commission. Here there is a federal cause of action with respect to the respondents' antitrust claims.

b. The United States, however, believes that while it may be appropriate for the Commission to determine certain issues, the antitrust court has the ultimate responsibility for determining the issue of the alleged anticompetitive effect of the price squeeze, and believes that the Commission's determination of that issue would not be binding on the court. Thus, the United States does not agree with the Commission to the extent that the latter reads *Conway* as making its determination of the competitive issues concerning the price squeeze binding on the antitrust court. In requiring the Commission to consider the possible anticompetitive effects of a price squeeze, this Court in *Conway, supra* 426 U.S. at 279, relied on its earlier decision in *Gulf State Utilities, supra*. There, this Court noted that Commisison consideration of competitive issues serves as the "first line of defense" against practices that might later be the subject of antitrust proceedings. 411 U.S. at 760. The Commission's reading of *Conway* would render it not the "first line of defense" against anticompetitive price squeezes, but rather the final arbiter of the competitive impact and consequent antitrust legality of the squeeze. As such, the United States believes that the Commission's view represents a misreading of *Conway* which would have the practical effect of allowing it to confer antitrust immunity, contrary to the principles articulated by this Court, as discussed in Part I, *supra*.[11]

The policy considerations underlying the primary jurisdiction doctrine do not support its application to the competitive impact of a specific pair of wholesale and retail rates. Resolution of issues of anticompetitive intent and effect relevant to a Section 2 Sherman Act complaint

[11]The United States finds it particularly difficult to accept the logic of the Commission's view as to past rates. Since the Commission has no authority to remedy past rates and no discernible present interest therein, the United States perceives no policy reason which supports making the Commission's determination of the competitive impact of a price squeeze caused by past rates binding on the antitrust courts.

involves judicial rather than agency expertise. Cf. *California* v. *Federal Power Commission*, 369 U.S. 482, 490. As long as the antitrust court limits itself to the competitive implications of the price squeeze and refrains from independent assessment of the reasonableness of the jurisdictional rates, there is no danger of an undesirable court-agency conflict arising. Accordingly, the United States believes that when an antitrust court has acquired jurisdiction over a price squeeze allegation, the court should be bound by the Commission's determination of the reasonableness of the wholesale rates only with respect to their cost and all of the other factors traditionally applied in such a rate-making determination. The Commission's determination of the reasonableness of the wholesale rates, however, should not control the issues in the antitrust case of the anticompetitive purpose and effect of the relationship between the wholesale and retail rates. Cf. *California* v. *Federal Power Commission*, *supra*.[12]

The United States also believes that it may not be necessary in all cases for the antitrust court to defer to the Commission before finally adjudicating the antitrust claim. To the extent that the reasonableness of the wholesale rates, in terms of cost and other traditionally applied factors, are relevant to the antitrust claims, in some cases the Commission's standards may be sufficiently clear and applicable to the facts that the court could apply them without requiring the Commission's expertise. *United States* v. *Western Pacific R. Co.*, *supra*, 352 U.S. at 69.[13] That is a judgment, however, that should be made

[12]The antitrust court, of course, could invite the Commission to express its views on the competitive effects of the alleged price squeeze.

[13]Cf. *Nader* v. *Allegheny Airlines*, 426 U.S. 290, 308-309 (White, J., concurring); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 221-222.

in the first instance by the district court in light of the facts and circumstances as they develop in the litigation.

CONCLUSION

The court of appeals correctly held that the Commission does not have exclusive jurisdiction over the issues the complaint raises, and that it would be premature to stay the antitrust case pending the exercise of the agency's primary jurisdiction. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General.

JOHN H. SHENEFIELD,
Assistant Attorney General.

BARRY GROSSMAN
WILLIAM D. COSTON,
Attorneys
Department of Justice
Washington, D.C. 20530.

ROBERT R. NORDHAUS,
General Counsel,

HOWARD E. SHAPIRO,
Solicitor,

J. PAUL DOUGLAS,
Attorney,
Federal Energy Regulatory Commission
Washington, D.C. 20426.

April 1978.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

TOWN OF NORWOOD,
MASSACHUSETTS,
Plaintiff,

v.

BOSTON EDISON COMPANY AND
NEW ENGLAND POWER COMPANY,
Defendants.

Civil Action
No. 74-4104-T

MEMORANDUM

In an action by a Massachusetts town owning its own electric power distribution system against Boston Edison Company (Edison) and another, charging, *inter alia,* violations of the Robinson-Patman Act,[1] 15 U.S.C. § 13(a), Edison, arguing lack of subject matter jurisdiction, moved for summary judgment on the grounds that its sales to plaintiff were not in interstate commerce and electricity was not a commodity within the purview of § 2(a) of the Clayton Act. After this motion was filed but before it was ruled on, the action against Edison was settled. I have already ruled on the basis of undisputed facts that the remaining Defendant, New England Power Company (New England), of which Plaintiff was never a customer, should be granted summary judgment on Plain-

[1]Amending, of course, § 2(a) of the Clayton Act. See 15 U.S.C. § 13(a).

tiff's Robinson-Patman claims. Nothing in this Memorandum should be taken as a modification or amendment of my earlier ruling that, Plaintiff not being New England's customer, New England is entitled to summary judgment or of my denial of Plaintiff's motion for clarification. However, New England has asked me to rule, as Edison had also asked me to rule before its departure from the case, that electricity is not a commodity within the purview of Robinson-Patman, and I now address that issue.[2]

New England's argument appears to rest entirely on the holding of *Newark* v. *Delmarva Power and Light Co.*, 467 F. Supp. 763, 772-774 (D. Del. 1979). *Newark* is the only case that has been called to my attention in which the question of whether electricity is a "commodity" for regulatory power purposes was squarely raised and considered and the holding of that case supports Defendant's position. Plaintiff also appears to recognize the indistinguishability of the case at bar from *Newark*, arguing only that *Newark* was incorrectly decided.

The court in *Newark, supra,* 773 based its decision on "the wording of the statute, its legislative history, and the regulation of the electric utility industry which existed at the time the adoption of the Robinson-Patman Act." Although Robinson-Patman indeed reaches only the sale of "commodities," electricity would seem to come well within the dictionary definition of "commodity" as "(a) anything useful or that can be turned to commercial advantage." *The American Heritage Dictionary of the English Language,* p. 268. Since it is a well-known canon

---

[2]A memorandum and order on so much of New England's motions for summary judgment as is based on collateral estoppel claims will be forthcoming shortly.

of statutory construction that in the absence of ambiguity words should be given their ordinary meanings, *Perrin v. United States,* 100 S. Ct. 311, 314 (1979) and cases cited, I question whether there is any need in construing § 2(a) to look beyond the statutory language.

If there is such a need, however, the analysis in *Newark* is, I respectfully submit, unconvincing. That the statute refers to "commodities of like grade and quality" does not mean that it allows price discrimination in the sale of a commodity sold in only one grade or quality, even if as the court found or ruled (it is not clear which) electricity is such a commodity. If, indeed, the words "of like grade and quality" were not included in the statute, the courts would almost certainly have had to read them into the statute to keep it from becoming sheer nonsense. Differences in price among goods of unlike grade and quality are to be expected.

Nor does the fact that the statute preserves the right of a seller to select his own customers in "bona fide transactions" indicate that businesses like public utilities that have a lesser right or no right at all to select their own customers are not subject to the statute. Indeed, as I have ruled in a memorandum issued previously deciding the motion for summary judgment of defendant New England Power Company on plaintiff's Robinson Patman claims against New England Power, only a customer is entitled to the protection of § 2(a). Several industries and businesses may under various laws be prohibited from or restricted in selecting their own customers, but it does not follow that such businesses do not deal in "commodities" as that term is used in Robinson-Patman.

Footnotes omitted, the portion of the opinion in *Newark, supra,* 774, discussing the legislative history of the word "commodities" used in § 21(a) states:

> The section read as a whole reflects a concern about price discrimination with respect to manufactured products and consumer goods. The legislative history, reflecting the same concern, relates entirely to competitive problems then existing in the distribution of goods which conventionally were sold through a supplier-wholesaler-retailer channel that was being invaded by grocery chains and retail order houses. The House and Senate Reports, for example, refer to "goods, wares and merchandise" in discussing the scope of Section 2(a) and Representative Patman, when introducing his bill, spoke in terms of "food and merchandise distribution" and "huge chain stores."

It is hardly surprising that in 1936 Congressional reports and individual members of Congress would have thought in terms of "food and merchandise distribution" in explaining the purposes of the Robinson-Patman Act. It does not follow that they intended to exclude other items or products from its coverage. For example, if a legislature should enact a statute punishing the owners of "animals allowed to go unleashed on a public way," it would be of no help to the owner of an unleashed ocelot found on a public way that all of the legislative discussions of the bill had concerned dogs.

The position that electricity is a "commodity" within the purview of § 2(a) of the Clayton Act is also taken by Von Kalinowski, *Anti Trust Law and Trade Regulations,* § 24.05.

The *Newark* opinion, *supra,* 774, also concluded that the regulatory scheme by which Congress in 1935 established the Federal Power Commission[3] indicated an

[3]Now the Federal Energy Regulatory Commission.

intent that electric companies not be subject to Robinson-Patman, stating:

> Even more significant is the fact that the Congress which passed the Robinson-Patman Act in 1936 had a year earlier amended the Federal Power Act to provide for FPC review of all rates charged for the transmission or sale of electric power subject to its jurisdiction. The amendment, drawing from the Interstate Commerce Act, included a directive that the FPC review any disparity in rates between categories of the purchases so as to prohibit unreasonable discrimination. *St. Michaels Utilities Commission v. FPC,* 377 F.2d 912 (4th Cir. 1967). When this amendment was enacted Congress must have contemplated that the FPC and the courts would develop decisional rules for determining which differentials are discriminatory and which are not, as they have in fact done. *St. Michaels Utilities Commission v. FPC, supra.* Given the existence of this regulatory scheme in 1936 and the prevalence of state regulation of intrastate sales which Congress expressly reserved to the states in the Federal Power Act, I think it unlikely that Congress intended electric utilities rates to be subject to the Robinson-Patman Act rules governing justified or unjustified differentials or to the authority of the Federal Trade Commission "to fix and establish quantity limitations."

However persuasive this reasoning might be if there were no binding case law in point, the Supreme Court has in fact dealt with a very similar argument in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 373-375 (1973) holding:

> The District Court determined that Otter Tail's consistent refusals to wholesale or wheel power to its municipal customers constituted illegal monopolization. Otter Tail maintains here that

its refusal to deal should be immune from antitrust prosecution because the Federal Power Commission has the authority to compel pursuant to § 202(b) of the Federal Power Act. The essential thrust of § 202, however, is to encourage voluntary interconnections of power. See S. Rep. No. 621, 74th Cong., 1st Sess., 19-20, 48-49; H.R. Rep. No. 1318, 74th Cong., 1st Sess., 8. Only if a power company refuses to interconnect voluntarily may the Federal Power Commission, subject to limitations unrelated to antitrust considerations, order the interconnection. The standard which governs its decision is whether such action is "necessary or appropriate in the public interest." Although antitrust considerations may be relevant, they are not determinative.

There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest. As originally conceived, Part II would have included [a] "common carrier" provision making it the duty of every public utility to . . . transmit . . . ." In addition, it would have empowered the Federal Power Commission to order wheeling [if it found such action to be necessary] or desirable in the public interest." H.R. 5423, 74th Cong., 1st Sess.; S. 1725, [74th Cong., 1st Sess. These provisons] were eliminated to preserve "the voluntary action of the utilities." S. Rep. No. 621, 74th Cong., 1st Sess., 19.

It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these rela-

> tionships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. See *United States v. Radio Corporation of America, supra,* at 351, 79 S. Ct. 457, 467. This is particularly true in this instance because Congress, in passing the Public Utility Holding Company Act, which included Part II of the Federal Power Act, was concerned with "restraint of free and independent competition" among public utility holding companies. See 15 U.S.C. § 79a(b)(2).
>
> Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for, or to immunize Otter Tail from, antitrust regulation for refusing to deal with municipal corporations.

Although *Otter Tail* was decided under the Sherman Act, not Robinson-Patman, and although Sherman Act holdings cannot blindly be applied to Robinson-Patman actions, see *Gulf Oil Corp.* v. *Copp Paving Co., Inc.,* 419 U.S. 186, 194-195 (1974), there is nothing in *Otter Tail*'s discussion of non-preemption of antitrust jurisdiction by the Federal Power Commission that would offer a meaningful distinction between that case and the case at bar.

So much of the *Newark* opinion, *supra,* as deals with regulation of electric power by the Federal Power Commission is not really germane to the question of whether electricity is a commodity; *Newark* marshalls no argument or reasoning to show that Congress intended to accord electric power different treatment (as a non-commodity) under the Robinson-Patman Act from that accorded it under the Sherman Act. Because I am persuaded that elec-

tricity is a "commodity" within the purview of § 2(a) of the Clayton Act and because I am of the opinion that the *Otter Tail* case leaves no reason for an exemption from antitrust jurisdiction based on regulation by the Federal Energy Regulatory Commission, I would not grant summary judgment as to the Robinson-Patman claims put forth by plaintiff in this action on the basis that electricity is not a commodity. On New England's claim that it is entitled to summary judgment on the basis that plaintiff was never its customer, I have already entered an order granting summary judgment to New England.

/s/

DAVID BERMAN, MASTER

Entered this 12th day of May, 1980.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TOWN OF NORWOOD,	*	
	*	
Plaintiff,	*	
	*	
V.	*	CA 74-4104-T
	*	
NEW ENGLAND POWER COMPANY	*	
	*	
	*	
Defendant.	*	

ORDER

TAURO, D.J. May 7, 1982

For the reasons stated in the Master's memoranda, the following orders of the Master are affirmed and adopted by this court:

1) Order of March 24, 1980 granting defendant New England Power Co.'s motion for summary judgment as to plaintiff's Robinson-Patmain claims for discrimination.

2) Order of November 18, 1980 advising the trial court to conduct the trial on the theory that the findings of the Federal Power Commission, that NEPOOL was not anticompetitive in purpose or effect, are entitled to collateral estoppel effect.

3) Order of January 6, 1982 limiting the introduction of evidence to controvert certain facts deemed to have been established by the Federal Energy Regulatory Commision.

It is so ORDERED.

/s/

United States District Judge

Office-Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2278

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNION ELECTRIC COMPANY, PETITIONER

v.

CITY OF KIRKWOOD, MISSOURI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

BARRY GROSSMAN
NANCY C. GARRISON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a utility that charges wholesale and retail rates at levels that unfairly prevent its competitor-customers from competing with it ("price squeeze" conduct) is immune from the antitrust laws under the *Noerr-Pennington* doctrine solely because the rates were filed with state and federal regulatory agencies that did not order any changes creating or increasing the alleged anticompetitive effect.

2. Whether such an alleged "price squeeze" is immune from the federal antitrust laws by implication from the Federal Power Act, which creates no express antitrust exemption for wholesale electric rates subject to regulation by the Federal Energy Regulatory Commission and which confers no authority on FERC to regulate retail rates.

3. Whether such an alleged "price squeeze" is immune from the federal antitrust laws under the "state action" doctrine, where the conduct at issue is the result of essentially private decisions not compelled by the state, the state has articulated no policy in favor of the conduct at issue, and the state has no authority to regulate wholesale rates.

4. Whether electricity is a "commodity" within the meaning of the Robinson-Patman Act.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	6
Conclusion	14

TABLE OF AUTHORITIES

Cases:

CF Industries, Inc. v. *Transcontinental Gas Pipe Line Corp.*, 614 F.2d 33 12
California v. *FPC*, 369 U.S. 482 ..... 7, 11
California Retail Liquor Dealers Association v. *Midcal Aluminum, Inc.*, 445 U.S. 97 ..... 11, 12, 13
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 ..... 5, 7, 8, 11, 13
City of Batavia v. *FERC*, 672 F.2d 64 12
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 ..... 11, 13
City of Mishawaka v. *American Electric Power Co.*, 616 F.2d 976, cert. denied, 449 U.S. 1096 7
City of Mishawaka v. *Indiana & Michigan Electric Co.*, 560 F.2d 1314, cert. denied, 436 U.S. 922 12
Community Communications Co. v. *City of Boulder*, 455 U.S. 40 12
Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 ..... 5, 6, 7, ,8
Far East Conference v. *United States*, 342 U.S. 570 12
FPC v. *Conway Corp.*, 426 U.S. 721 ..... 11, 12
Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 7
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 13
Gordon v. *New York Stock Exchange, Inc.*, 422 U.S. 659 ..... 8, 9, 10
Group Life & Health Insurance Co. v. *Royal Drug Co.*, 440 U.S. 205 6
National Gerimedical Hospital and Gerontology Center v. *Blue Cross*, 452 U.S. 378 9

Cases—Continued Page

Otter Tail Power Co. v. *United States*, 410 U.S. 366 ..... 5, 8, 9, 10
Parker v. *Brown*, 317 U.S. 341 ..... 11, 12
Silver v. *New York Stock Exchange*, 373 U.S. 341 9
State of Louisiana v. *FPC*, 503 F.2d 844 12
Union Labor Life Insurance Co. v. *Pireno*, No. 81-389 (June 28, 1982) 6
United Mine Workers v. *Pennington*, 381 U.S. 657 ..... 5, 6, 7, 8
United States v. *Aluminum Co. of America*, 148 F.2d 416 6
United States v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 9
United States v. *Philadelphia National Bank*, 374 U.S. 321 9
United States v. *RCA*, 358 U.S. 334 ..... 8, 11

Constitution and statutes:

United States Constitution:
Article 6, Clause 2 (Supremacy Clause) 10
First Amendment 5
Federal Power Act, 16 U.S.C. (& Supp. V) 824 *et seq.* 2, 5, 8, 9
Section 824d(a) 2
Section 824d(b) 2
Section 824d(c) 2
Section 824d(d) (Supp. V) 2
Section 824d(e) 2
Section 824e(a) 3
Interstate Commerce Act, 49 U.S.C. (Supp. IV) 10706(a)(2)(A) 8
Robinson-Patman Act, 15 U.S.C. 13 *et seq.* 3, 4, 14
15 U.S.C. 13(a) 4, 5, 13
Sherman Act, 15 U.S.C. 1 *et seq.* 3, 6, 10, 11
Section 2, 15 U.S.C. 2 ..... 6, 9, 10
Mo. Ann. Stat. ch. 393 (Vernon 1952 & Cum. Supp. 1982) 2
§ 393.140(5) (Cum. Supp. 1982) 3
§ 393.150 (Cum. Supp. 1982) 3

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2278

UNION ELECTRIC COMPANY, PETITIONER

v.

CITY OF KIRKWOOD, MISSOURI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Union Electric Company (UE) is an electric utility that produces, transmits, and delivers electric power to wholesale and retail customers in Missouri, Iowa, and Illinois (Pet. App. A-3). Respondent (Kirkwood), a municipal corporation, sells electric power at retail to customers in approximately two-thirds of its geographic area (*ibid.*).

Kirkwood does not produce electricity, but buys it at wholesale from UE. Customers in the area of Kirkwood not served by the municipal distribution system buy power at retail from UE (*ibid.*).

UE's *wholesale* rates are regulated by the Federal Energy Regulatory Commission (FERC)[1] under the Federal Power Act, 16 U.S.C. (& Supp. V) 824 *et seq.* UE's *retail* rates are regulated by the Missouri Public Service Commission under Mo. Ann. Stat. ch. 393 (Vernon 1952 & Cum. Supp. 1982).

The Federal Power Act requires that all rates subject to FERC's jurisdiction be just and reasonable, and not unduly discriminatory or preferential. 16 U.S.C. 824d(a) and (b). Public utilities, such as UE, must file with FERC "schedules showing all [wholesale] rates and * * * all contracts which in any manner affect or relate to such rates." 16 U.S.C. 824d(c). Before making any modification of such rates, the utility must give 60 days notice to FERC and the public. 16 U.S.C. (Supp. V) 824d(d). On complaint or on its own initiative, FERC may order a hearing into the lawfulness of a filed rate change and may suspend the proposed change for up to seven months. 16 U.S.C. (Supp. V) 824d(d) and 16 U.S.C. 824d(e).[2] If FERC does not order a hearing on a proposed rate change, the new rate takes effect at the end of the 60-day notice period.

---

[1] Prior to October 1, 1977, the Federal Power Commission (FPC) had essentially the same statutory authority insofar as is here relevant. References to FERC in this brief should be interpreted, where appropriate, as referring to the FPC.

[2] If a hearing is not completed before the expiration of the suspension period, the proposed rate schedule takes effect, but FERC may require the utility to refund with interest any portion of the increase subsequently found "not justified."

In addition, on its own motion or on complaint, FERC may order a hearing to determine whether any previously established rate or contract is "unjust, unreasonable, unduly discriminatory or preferential"; if it finds that it is, FERC may establish a just and reasonable rate or contract that the utility must observe. 16 U.S.C. 824e(a).

Missouri state law requires that utilities file their *retail* electric rates with the Missouri Public Service Commission (PSC). A retail rate cannot go into effect until the PSC approves it, but the PSC must act within 11 months after a rate proposal is filed. Mo. Ann. Stat. § 393.150 (Vernon Cum. Supp. 1982). The standard applied by the PSC in deciding whether to approve a rate is whether it is unjust, unreasonable, unjustly discriminatory, or unduly preferential. Mo. Ann. Stat. § 393.140(5) (Vernon Cum. (Supp. 1982).

2. On September 1, 1977, Kirkwood filed a complaint alleging that UE had violated the Sherman Act, 15 U.S.C. 1 *et seq.*, and the Robinson-Patman Act, 15 U.S.C. 13 *et seq.* It sought damages and injunctive relief. The complaint alleged that UE had monopolized and attempted to monopolize the retail distribution and sale of electric power by imposing an anticompetitive "price squeeze" [3] on Kirkwood

[3] A "price squeeze" may arise in a situation in which a firm competes with its supplier. In the present case, Kirkwood is a retailer that competes with its wholesale supplier, UE, for retail business. Thus, if UE raises its wholesale prices to Kirkwood, but maintains its retail prices at a level that would not allow Kirkwood to make a profit based on its increased wholesale costs, then Kirkwood is subjected to a "price squeeze." Whether a "price squeeze" is anticompetitive depends on a number of factors, including the relative efficiency of the competing firms and whether the price relation complained of is attributable to the supplier's conduct rather than forced on the supplier by a public authority.

by manipulating the relationship between its wholesale rate to Kirkwood and its retail rates. In 1975, UE was alleged to have increased its wholesale rate for electric power by more than 33% while taking no action to increase its retail rates. Pet. App. A-30. As a result, Kirkwood alleged, it "paid approximately 35 percent more than Union was selling comparable power at retail to its large industrial primary service customers." *Ibid.* This practice, Kirkwood alleged, was similar to previous UE rate practices. Although UE subsequently increased its retail rates and reduced its wholesale rates somewhat (as a result of settlement of FPC proceedings), it was Kirkwood's contention that the price squeeze continued. *Id.* at A-31.

According to Kirkwood, the price squeeze caused antitrust injury by precluding Kirkwood from competing with UE for retail sales.[4] The complaint also alleged that the disparity between UE's wholesale and retail rates had substantially lessened competition between UE and Kirkwood, thus violating the Robinson-Patman Act, 15 U.S.C. 13(a).

3. The district court granted summary judgment for UE. Pet. App. A-19 to A-24.[5] The court held that

---

[4] Kirkwood alleged that it was precluded from "selling power to its customers at retail at the same rates charged by [UE] at retail without impairing the traditional benefits derived by [Kirkwood] from its municipally owned system" (Pet. App. A-30 to A-31), and that this "result[ed] in a loss of revenues and/or pressure on the citizens and officials of [Kirkwood] to discontinue operating the utility and to offer to sell or lease it to [UE]" (*ibid.*).

[5] The district court had previously dismissed the Robinson-Patman Act claim on the grounds that electricity is not a "commodity" within the meaning of the Act and that the

Kirkwood's exclusive remedy for the alleged price squeeze was with the state and federal regulatory agencies. UE's rates, the court also held, were exempt from antitrust challenge because they were subject to federal regulation under the Federal Power Act and state regulation by the Missouri PSC. Finally, the court held that UE's filing of tariffs with FERC and the state commissions, and its collection of rates pursuant to those tariffs were immune from antitrust liability under the First Amendment and the *Noerr-Pennington* doctrine.[6]

4. The court of appeals reversed. It held that FERC and PSC did not have exclusive jurisdiction over the price squeeze claim. Pet. App. A-6 to A-11. Rather, the court held, under this Court's decisions in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), and *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973) (*Otter Tail*), the antitrust laws are applicable to regulated utilities and an award of antitrust damages would not infringe on FERC's regulatory jurisdiction. The court of appeals further held that the price squeeze claims were not immunized by the state action doctrine because there was no legislative policy favoring the conduct at issue and because the interrelation of the wholesale and retail rates was not controlled by regulatory authorities. Finally, the court held that there was no immunity under *Noerr-Pennington* because: "It is not for expression of

---

complaint did not sufficiently allege sales in interstate commerce. Kirkwood moved for reconsideration of that order, but the district court granted summary judgment in favor of UE without specifically ruling on that motion.

[6] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (*Noerr*); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965) (*Pennington*).

opinion that Kirkwood seeks to compel UE to respond in damages, but rather for UE's conduct in the market place." Pet. App. A-14 to A-15.[7]

DISCUSSION

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.[8] Review by this Court is therefore unwarranted.

1. Petitioner argues first that the alleged price squeeze[9] is immunized from antitrust scrutiny by the *Noerr-Pennington* doctrine. This argument was properly rejected by the court of appeals. The *Noerr-Pennington* doctrine reflects this Court's conclusion that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Noerr*, *supra*, 365 U.S. at 135.

---

[7] The court of appeals also held that electricity is a "commodity" for purposes of Kirkwood's Robinson-Patman Act claim.

[8] The court of appeals did not address the merits of respondent's antitrust claims. The fact that petitioner's conduct is not exempt from the antitrust laws does not, of course, establish an antitrust violation. See *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 n.5 (1979); *Union Labor Life Insurance Co.* v. *Pireno*, No. 81-389 (June 28, 1982), slip op. 5.

[9] A firm that has monopoly power is said to have engaged in a "price squeeze" and has violated Section 2 of the Sherman Act, 15 U.S.C. 2, if it discriminates against customers who are its competitors in another market (i.e., charges them higher prices not justified by differences in costs), if that discrimination unduly impedes competition, and if the monopolist's pricing is intended to have that effect. See *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 436-438 (2d Cir. 1945).

In other words, Congress did not intend the antitrust laws to apply to attempts by private parties to obtain government action that would restrain competition—even where the result is subsequent government action that in fact imposes such a restraint.

Noerr-Pennington is inapplicable here, however, because Kirkwood did not base its complaint on the results of restrictive governmental action sought by UE or on UE's efforts to obtain such governmental action. Kirkwood does not challenge the legality of either the wholesale rate approved by FERC or the retail rate approved by the Missouri PSC. Rather, Kirkwood has alleged that it was injured by the relationship between those rates, decided upon and put into effect by a private party, UE, for the purpose of eliminating Kirkwood as a competitor. Since no regulatory body imposed, or had jurisdiction to impose, the combination of rates whose competitive effect is challenged, petitioner's *Noerr-Pennington* arguments were properly rejected by the court of appeals.[10]

Petitioner's argument that such private conduct is immunized merely because UE obtained governmental acquiescence or approval constitutes an unwarranted attempt to expand the *Noerr* doctrine, and is directly contrary to this Court's holding in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 601-602 (1976), that anticompetitive conduct pursuant to a tariff filed with a regulatory body is not immune from antitrust scrutiny.[11] See also *California* v. *FPC*, 369 U.S. 482, 488-

---

[10] A similar *Noerr-Pennington* defense to a price squeeze claim was rejected by the Seventh Circuit in *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976, 981-983 (1980), cert. denied, 449 U.S. 1096 (1981).

[11] Petitioner contends (Pet. 7) that the court of appeals' reliance on *Cantor* was unjustified because the Court's refer-

489 (1962); *United States* v. *RCA*, 358 U.S. 334, 350-352 (1959). Indeed, in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945), this Court held that private actions designed to influence rates that are subject to regulation are not immune from the antitrust laws because of subsequent regulatory adoption of the rates—a holding that has not been overruled by *Noerr* or any other decision.

2. Petitioner also contends (Pet. 9-12) that this Court's decision in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), requires a holding that the Federal Power Act creates an implied[12] antitrust exemption for the price squeeze at issue in this case.[13] The court of appeals correctly rejected this argument.

The strict standards that govern judicial determination of implied antitrust immunity based on subse-

---

ence to *Noerr* appears in a portion of Justice Stevens' opinion not concurred in by a majority of the Court (428 U.S. at 601-602) and because the *Cantor* decision did not turn on *Noerr-Pennington*. We believe reliance on *Cantor* was appropriate. No member of the Court expressed the view that the conduct at issue in *Cantor* was immunized by *Noerr*. Moreover, if a majority in *Cantor* had concluded that *Noerr* conferred immunity, there would have been no need to remand the case.

[12] The Federal Power Act contains no express antitrust exemption applicable to the conduct at issue in this case. In contrast, the Interstate Commerce Act, for example, provides an express and limited antitrust exemption for collective ratemaking agreements approved by the ICC. 49 U.S.C. (Supp. IV) 10706(a)(2)(A).

[13] Petitioner concedes (Pet. 9) that federal and state regulation of electric utilities has been held by this Court not to create any general exemption or immunity from the federal antitrust laws. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976).

quent regulatory statutes have been articulated by this Court in a long line of cases and "are well established." *National Gerimedical Hospital and Gerontology Center* v. *Blue Cross*, 452 U.S. 378, 388 (1981) (*National Gerimedical*). Exemptions from the antitrust laws are not favored; such exemptions " 'can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.' " *National Gerimedical*, *supra*, 452 U.S. at 388, quoting *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719-720 (1975); see also *Gordon* v. *New York Stock Exchange, Inc.*, *supra*, 422 U.S. at 682; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372 (1973). Even then, repeal of the antitrust laws is implied narrowly, only to the minimum extent necessary to make the regulatory scheme work —so as to effectuate the fundamental principles of the antitrust laws to the maximum extent consistent with the regulatory scheme. *National Gerimedical*, *supra*; *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357-359 (1963).

It follows that no implied exemption should be found in this case because, contrary to petitioner's contention, there is no "clear repugnancy" between the Federal Power Act and the application of the Sherman Act to the conduct at issue. There is no indication in the language or legislative history of the Federal Power Act that it was intended to authorize a price squeeze. Nor is there any inherent inconsistency between the requirement of the Federal Power Act that rates be "just and reasonable" and the application of Section 2 of the Sherman Act to price

squeezes.[14] Thus, as in *Otter Tail*,[15] the conduct at issue here remains subject to the Sherman Act.

The situation is entirely different from that which led this Court to find implied immunity in *Gordon*. There, the implied exemption for the conduct at issue—the fixing of rates for brokerage commissions—was based on actual conflict between the antitrust laws and the applicable regulatory statute. The Court found that the securities laws were intended to authorize, subject to regulatory supervision, the fixing of brokerage commission rates, which otherwise would have constituted price fixing—a per se violation of the Sherman Act. It was Congress' authorization of the conduct at issue,[16] and not the mere

---

[14] The possibility that conflict might arise in the future (if, for example, a price squeeze were proved and if the district court then ordered UE to remedy the price squeeze by lowering its wholesale rates to a level deemed unreasonably low by FERC) does not warrant a grant of immunity in the absence of any actual conflict. *Otter Tail, supra*, 410 U.S. at 376.

[15] Petitioner seeks to distinguish this case from *Otter Tail* and *Cantor* (a case that involved the state action exemption, see pages 12-13, *infra*) on the ground that (Pet. 9-10) "[t]he alleged violations of the antitrust laws in those cases involved various activities other than the filed electric rates" while in this case "the alleged violation is based *solely* on the economic effect of [UE's] rates * * *" (emphasis in original). This distinction, however, does not affect the basic principle applicable to this case: antitrust immunity will not be implied in the absence of actual conflict with a federal regulatory statute.

[16] Congress, of course, may authorize private conduct that otherwise would violate the antitrust laws. Under the Supremacy Clause (Article 6, Clause 2), however, states cannot override federal antitrust law. Therefore, the implied repeal doctrine does not apply to state legislation. This is to be distinguished from the state action doctrine, which recognizes

existence of federal regulatory authority to review conduct under a standard different from that of the Sherman Act, that led to a determination that the restraints at issue were immune from antitrust liability.[17]

Petitioner also is incorrect in contending (Pet. 13-14) that *FPC* v. *Conway Corp.*, 426 U.S. 721 (1976), precludes application of the Sherman Act to the alleged price squeeze. This Court held in *Conway* that the FPC has jurisdiction to consider the relationship between jurisdictional (wholesale) and nonjurisdictional (retail) rates in determining whether jurisdictional rates are just, reasonable and nondiscriminatory. *Conway* did not hold that the FPC's jurisdiction to consider price squeeze allegations was exclusive, and there is no indication that Congress intended to give FERC sole jurisdiction to consider and remedy

---

that Congress did not intend the Sherman Act to prohibit restraints that are fairly attributable to state decisions to replace competition with state supervision and control rather than private conduct. *Parker* v. *Brown*, 317 U.S. 341, 350-351 (1943). Where conduct is fairly attributable to private parties it is subject to the Sherman Act even if approved by a state. *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 n.45 (1978); *Cantor* v. *Detroit Edison Co.*, *supra*; *Parker* v. *Brown*, *supra*, 317 U.S. at 351.

[17] Thus, the fact that an agency must consider the competitive effects of action subject to its jurisdiction before approving it as consistent with the public interest as defined by the regulatory statute does not justify an implied antitrust immunity. See, e.g., *United States* v. *RCA*, 358 U.S. 334 (1959) (FCC approval of exchange of broadcast licenses does not confer antitrust immunity); *California* v. *FPC*, 369 U.S. 482 (1962) (FPC approval of acquisition does not confer antitrust immunity).

alleged price squeezes.[18] Application of the antitrust laws to alleged price squeezes would not frustrate FERC's regulation of wholesale rates. On the contrary, the availability of antitrust relief provides a necessary complement to FERC's limited power to remedy a price squeeze. All that FERC can do prospectively is to adjust the wholesale rate within the zone of reasonableness.[19] See *FPC* v. *Conway Corp.*, *supra*, 426 U.S. at 278. If this is inadequate to remedy a price squeeze, FERC cannot compel a utility to file higher retail rates.[20]

3. Petitioner's final argument for antitrust immunity is that the conduct at issue falls within the state action exemption of *Parker* v. *Brown*, 317 U.S. 341 (1943). The conduct alleged to violate the antitrust laws in this case, however, does not constitute "state action" as that doctrine has been articulated by this Court. Rather, what is at issue is an essentially private restraint that is fully subject to the antitrust laws.

---

[18] Nor can FERC award damages for the effects of unreasonable or discriminatory rates. *City of Mishawaka* v. *Indiana & Michigan Electric Co.*, 560 F.2d 1314, 1325 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978); see also *CF Industries, Inc.* v. *Transcontinental Gas Pipe Line Corp.*, 614 F.2d 33, 35-36 (4th Cir. 1980); *State of Louisiana* v. *FPC*, 503 F.2d 844, 867-868 (5th Cir. 1974).

[19] With respect to past harm, FERC can award refunds only in cases where it has suspended the rate; it cannot otherwise provide retroactive relief. *City of Batavia* v. *FERC*, 672 F.2d 64, 89 (D.C. Cir. 1982).

[20] Under the doctrine of primary jurisdiction the antitrust court may refer to FERC any issues calling for the agency's expertise. *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952); *City of Mishawaka* v. *Indiana & Michigan Electric Co.*, *supra*, 560 F.2d at 1322.

This Court held in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), that "anticompetitive activities must be *compelled* by direction of the State acting as a sovereign" in order for private defendants to claim state action immunity for their conduct. 421 U.S. at 791 (emphasis added). This holding was reaffirmed in *Cantor* v. *Detroit Edison Co.*, *supra*, 428 U.S. at 592-598.[21] Nothing in the Court's subsequent state action decisions involving state agencies and instrumentalities [22] has altered this compulsion standard for assessing private conduct. Neither the price squeeze at issue in this case nor UE's retail rates themselves are compelled by the state of Missouri. Therefore, under this Court's prior holdings, the state action defense is not available to UE.

In addition, even if the state action criteria applicable to governmentally imposed restraints (rather than the compulsion test) were applied to UE's alleged price squeeze, it still would be subject to the antitrust laws under the standard of *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, *supra*, 445 U.S. at 105. As the court of appeals correctly found (Pet. App. A-13), there is no clearly articulated state policy in favor of the alleged price squeeze, and the relationship between UE's wholesale and retail rates cannot be "actively supervised" by the state of Missouri since it has no authority over UE's wholesale rates.

---

[21] See also 428 U.S. at 600 (plurality opinion); 428 U.S. at 604 (Burger, C.J., concurring); 428 U.S. at 609 (Blackmun, J., concurring); 428 U.S. at 623-626 (Stewart, J., dissenting) (all indicating approval of *Goldfarb* compulsion test).

[22] *City of Lafayette* v. *Louisiana Power & Light Co.*, *supra*; *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, *supra*; *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.[23]

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

BARRY GROSSMAN
NANCY C. GARRISON
Attorneys

DECEMBER 1982

---

[23] The other issue presented in the petition—whether electricity is a "commodity" within the meaning of the Robinson-Patman Act—does not warrant review by this Court at this stage of the litigation. Petitioner has failed to show that the Eighth Circuit's holding on this issue is in conflict with that of any other court of appeals. At most, it has shown a conflict with two district court decisions (Pet. 16-17). Nor is the issue of sufficiently great importance to require decision by this Court in the absence of conflict; it has arisen only rarely in reported decisions of the lower courts. See Pet. 16-17; Br. in Opp. 17-19.

Moreover, the question whether electricity is a "commodity" may not dispose of petitioner's Robinson-Patman Act claim. The district court also held that claim defective for failure to allege that the challenged sales took place in interstate commerce. As the court of appeals noted (Pet. App. A-15): "Kirkwood asked for leave to amend its complaint to correct the supposed deficiency, but the District Court never ruled on the request." Thus, any review of this issue should await final determination of the Robinson-Patman Act claim by the lower courts.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 398220 1230